88-753

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No. _____

In the

Supreme Court of the United States

October Term, 1988

In Re: FCX, INC.; Employer's Identification No. 560220040, *Debtor*

UNIVERSAL COOPERATIVES, INC.,

Petitioner,

v.

FCX, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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§ 506. Determination of Secured Status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest of the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed dispostion[sic] or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

§ 1122. Classification of Claims or Interests.

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

§ 1123. Contents of plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507 (a) (1), 507 (a) (2), or 507 (a) (7) of this title and classes of interests;

(2) specify any class of claims or interest that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized bofore of after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with repect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends, and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interest; and

(5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

§ 1125. Postpetition disclosure and solicitation.

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

(2) "investor typical of holders of claims or interests of the relevant class" means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable non-bankruptcy law, rule, or regulation, but an agency or official whose duty is to ad-

minster or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.

(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor, under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

§ 1127. Modification of plan.

(a) Omitted.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Omitted.

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable; [*sic*]

(5) (A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111 (b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507 (a)(1) or 507 (a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507 (a)(3), 507 (a)(4), 507 (a)(5) or 507 (a)(6) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507 (a)(7) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at

least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(b)(1) Notwithstanding section 510 (a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of

such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127 (b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsection (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

No. 88-1525

United States Court of Appeals
For The Fourth Circuit

In re: FCX, INC.; Employer's Identification No. 560220040, *Debtor*

Universal Cooperatives, Inc.,
Creditor-Appellant,

versus

FCX, Inc.,
Debtor-Appellee,

The National Council of Farmer Cooperatives ("National Council"),
Amicus Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (87-836-5)

Argued June 22, 1988. Decided August 11, 1988

Before PHILLIPS and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

James R. Crassweller (Eugene M. Warlich, DOHERTY, RUMBLE & BUTLER, P.A. on brief); Gregory Byrd Crampton (MERRIMAN, NICHOLLS & CRAMPTON, P.A. on brief) for Appellant. William Henry McCullough, Douglas Quinn Wickham (ADAMS, MCCULLOUGH & BEARD on brief) for Appellee.

(Leslie S. Mead, Associate General Counsel NATIONAL COUNCIL OF FARMER COOPERATIVES on brief) for Amicus Curiae.

PHILLIPS, Circuit Judge:

Universal Cooperatives, Inc. (Universal) here challenges an order of the bankruptcy court, affirmed by the district court on direct appeal, allowing the modification of a confirmed Chapter 11 plan under which FCX, Inc., a debtor of Universal's, was operating. That order authorized FCX to release collateral securing its indebtedness to Universal in satisfaction of Universal's claim. Universal raises three issues: that (1) FCX was not, as a matter of substantive bankruptcy law, entitled to the relief granted by the bankruptcy court, (2) the bankruptcy court did not follow the procedures required for plan modification under the Bankruptcy Code, and (3) even were FCX entitled to release the collateral in satisfaction of Universal's claim, the bankruptcy court should not have valued the collateral at face value. We affirm.

I

Universal is a non-profit agricultural cooperative association organized under Minnesota law. Minn. Stat. Ann. § 308.05 *et seq.* (West Supp. 1988). Universal's members, called patrons, are also cooperatives. FCX, which was organized under the North Carolina Cooperative Marketing Act, has been a patron of Universal since Universal's formation in 1980 through the merger of two other cooperatives. In addition to marketing the products of its own members, FCX purchased farm supplies from Universal, as well as other sources, for resale to those members.

In order to maintain its tax favored status under federal and state law, Universal is required to distribute its annual net income to its members. Universal's by-laws authorize its board of directors to make these distributions, commonly called "patronage refunds" or "patronage dividends," in the form of cash, qualified or non-qualified written notices of allocation, or any combination thereof. A written notice of allocation includes:

[A]ny capital stock, revolving fund certificate, retain certifi-

> cate, certificate of indebtedness, letter of advice or other written notice which discloses to the recipient the stated dollar amount allocated to him by the organization and the portion thereof, if any, which constitutes the patronage refund or dividend.

Joint Appendix at 67 (quoting from Universal's by-laws).

Universal historically has made patronage refunds in a combination of cash and certificates of participation ("patronage certificates"). The total amount of the patronage refund to a given member is based on that member's proportionate share of Universal's total business for the year. Pursuant to the tax scheme, Universal takes a deduction against income for the total amount of the patronage distribution, while each member reports as income, and pays taxes on, its individual share of the total. Patronage certificates are valued at face value for both purposes.[1]

Universal's by-laws authorize the redemption of the patronage certificates "on an equitable basis in whole or in part at such time, in such manner and in such order as shall be determined by the Board of Directors." Joint Appendix at 68. Its Articles of Incorporation also grant Universal a first lien on a member's patronage certificates as security for any indebtedness of the member to Universal and, in accordance with this security scheme, vest Universal's board with the discretionary right to set off a member's indebtedness against a member's patronage certificates. The Articles, however, reject any right of a member to have such a setoff made.

Since its formation, Universal has periodically redeemed patronage certificates on a first-issued, first-redeemed basis — meaning that the oldest outstanding certificates are redeemed first. To date under this method, only certificates from the pre-merger period, essentially pre-1980, have been redeemed. FCX holds unredeemed certificates in the face value amount of $1,116,129, some of which date back to the pre-merger period.

On September 17, 1985, FCX filed for protection under Chapter 11 of the Bankruptcy Code. On November 1, 1985, Universal

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[1]Universal also carries the patronage certificates at face value on its balance sheet.

filed a proof of secured claim in the amount of $658,887.14[2] reflecting the account receivable due from FCX to Universal for products purchased by FCX prior to the date of bankruptcy. This indebtedness was secured by FCX's unredeemed patronage certificates.

FCX filed its Disclosure Statement and proposed Plan of Reorganization on June 6, 1986. Neither document listed Universal as an impaired creditor, nor specifically described the proposed disposition of FCX's patronage certificates in Universal. The plan did indicate that FCX intended to liquidate its investments in the cooperatives of which it was a member and hold the proceeds in a liquidating trust, primarily for the benefit of unsecured creditors and subordinated debenture holders.[3] The Plan also indicated FCX's intent to satisfy "priority claims" from the liquidation of non-operating assets, which included tangible personal property, real estate, inventory items, and FCX's interests in other cooperatives. FCX's Plan was confirmed in August 1986.

Some 8 months later, FCX filed a notice of its intent to abandon a portion of its Universal patronage certificates in full satisfaction of Universal's secured claim. Universal objected to the abandonment primarily on the grounds that Universal's by-laws vested its board with sole and absolute discretion to redeem, or set off a member's indebtedness against, outstanding patronage certificates. The parties thereafter filed a stipulation of the facts underlying the issue with the bankruptcy court.

The bankruptcy court then held a hearing on the abandonment issue on June 1, 1987. A question was apparently raised at the

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[2]Since filing its proof of claim, Universal has at least once ordered the redemption of a portion of FCX's patronage certificates — $37,416 in August 1986, and applied the amount against Universal's claim. The parties stipulated to the bankruptcy court that the balance due on Universal's claim as of June 1, 1987 was $621,471.14. FCX apparently contends that Universal redeemed another approximately $37,000 in August 1987. It is not clear whether this amount was also applied to Universal's claim.

[3]As to this last class of creditors, the Plan specifically provided that: "within thirty (30) days of the date of confirmation, the trustee [of the liquidating trust] shall distribute to holders of subordinated debentures, certificates of participation reflecting the face amount of the prior subordinated debenture." Joint Appendix at 28.

hearing as to the appropriateness of abandonment in the circumstances and the court, by letter dates June 5, 1987, informed the parties that it indeed considered "abandonment" an inappropriate remedy. Instead, the court proposed to "decide the issue of whether FCX, through plan modification, may surrender a portion of the Universal patronage certificates to Universal in satisfaction of Universal's secured claim." Counsel for FCX later notified the court that FCX and Universal agreed to request that the court decide the stated issue.[4]

By memorandum opinion and order dated June 23, 1987, the bankruptcy court authorized FCX to turn over to Universal that amount of the patronage certificates, valued at face value, as was necessary to satisfy fully Universal's claim. The bankruptcy court's order was upheld by the district court which found that (1) the modification granted was supported by substantive bankruptcy law, (2) the certificates were properly valued at face value, and (3) while the modification procedure did not strictly comply with the bankruptcy code's requirements, "there was substantial compliance and a waiver by the parties of strict compliance...."

This appeal followed.

II

Universal first contends that the Bankruptcy Code provides no authority for the bankruptcy court essentially to order Universal's board to exercise its discretion to set off FCX's indebtedness to Universal against FCX's patronage certificates. Resolution of this issue requires a two-step analysis involving both state and federal law.

The filing of a debtor's petition in bankruptcy creates an estate comprised of the property listed in 11 U.S.C. § 541(a), including "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541 (a)(1). Despite

[4]At this stage of the case, there remains substantial disagreement over the scope of the agreement of the parties that was reported to the bankruptcy court. Universal contends that it consented only to the bankruptcy court's decision of the threshold question whether FCX could even seek plan modification at that time, not the merits of the actual modification sought. This is one of the bases of Universal's second point on appeal.

its broad definition of those interests of the debtor that become property of the estate, *see In re Ryan*, 15 B.R. 514, 517 (D. Md. 1981) (noting that § 541 (a) is "broad and all-embracing"); *see also McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204 (4th Cir. 1985) (same as to § 541 (a)(1)), neither § 541 (a), nor any other Bankruptcy Code provision, answers the threshold questions of whether a debtor has an interest in a particular item of property and, if so, what the nature of that interest is. *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986); 4 *Collier on Bankruptcy* para. 541.02, at 541-11 (15th ed. 1985) (The Bankruptcy Code does not "provide [ ] any rules for determining whether the debtor has an interest in property..."). The estate under § 541 (a) succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case. *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 662 (4th Cir. 1985); *see also Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984) ("[W]hatever rights a debtor has in property at the commencement of the case continue in bankruptcy — no more, no less."). The existence and nature of a debtor's, and hence the estate's, interest in property must be determined by resort to nonbankruptcy law, *in re Polycorp Assoc., Inc.*, 47 B.R. 671, 673 (N.D. Cal. 1985); *see generally* 4 *Collier on Bankruptcy* para. 541.01, at 541-10, 10-13 (The "existence and nature of the debtor's interest in property... are determined by nonbankruptcy law," usually state law.) — either federal law, *see, e.g., In re Massenqill*, 73 B.R. 1008 (E.D.N.C. 1987) (debtor's interest in property governed by Farm Credit Act of 1971, 12 U.S.C. § 2001, *et seq.*), or, as is the case here, state law. *See, e.q., In re N.S. Garrott & Sons*, 772 F.2d 462, 466 (8th Cir. 1985) ("The nature and extent of the debtor's interest in property are determined by [Arkansas] state law.").

There is no dispute that FCX has an interest in the patronage certificates and that such interest became property of the bankruptcy estate upon the filing of FCX's Chapter 11 petition. *See, e.g., In re Schauer*, 62 B.R. 526, 529 (D. Minn. 1986) (recognizing that patronage equity held by a debtor in a cooperative becomes property of the estate); *In re Lamar Farmers Exchange*, 76 B.R. 712, 716 (W.D. Mo. 1987) (same). There is also no dis-

pute that under Minnesota state law, and specifically Universal's by-laws, FCX's interest is limited; the certificates are not currently due and payable or payable on FCX's demand. Rather, the certificates represent a contingent entitlement; FCX's right to a share of Universal's profits payable at such time, and in such increments, as Universal's board determines in the exercise of its discretion. *See Atchison County Farmers Union Coop. Ass'n v. Turnbull*, 736 P.2d 917, 921 (Kan. 1987) (characterizing patronage equity in a cooperative as a contingent interest not immediately payable that vests when the cooperative board exercises its discretion and determines that the equity should be redeemed). As FCX does not contend that it is not bound by the by-laws[9] or that they are somehow invalid or unenforceable against FCX under state law, the estate's interest is equally limited. *See* 4 *Collier on Bankruptcy* para. 541.01, at 541-6 ("To the extent that an interest is limited in the hands of the debtor, it is, therefore, equally limited in the hands of the estate." (Footnote omitted.)). Were this the final point in our analysis, Universal would be entitled to judgment in its favor. As we noted, however, our analysis does not end with the characterization of the property interests of the estate under state law.

Because "Congress may . . . abrogate state law entitlements in bankruptcy pursuant to its Bankruptcy Clause Power, U.S. Const. art. I, § 8, cl.4," *In re Farmers Markets*, 792 F.2d at 1403, we must ask further whether there exists any conflicting bankruptcy law which overrides the discretionary power over the redemption of the patronage certificates vested in Universal's board by state

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[9]While we need not address the issue, we are in general agreement with those decisions characterizing the by-laws and Articles of Incorporation of a cooperative as a contract between the cooperative and its members. *See, e.g., Atchison County*, 736 P.2d at 921 ("A member or a stockholder of a cooperative association is bound by the bylaws . . . ."); *In re Schauer*, 62 B.R. at 531 (noting that members of a cooperative consent to be governed by the cooperative's by-laws and policies when they become members).

law and its by-laws.[6] FCX here contends that § 1123 (a)(5)(D) preempts the restrictive provisions of Universal's by-laws and allows it to release the patronage certificates in satisfaction of Universal's claim.

Section 1123 (a)(5)(D) provides, among other things, for the distribution of collateral which is property of the estate to a party holding a security interest in the collateral in satisfaction of that party's secured claim. Prior to 1984, § 1123 (a)(5)(D) read as follows:

> (a) A plan shall—
>
> . . .
>
> (5) provide adequate means for the plan's execution, such as—
>
> . . .
>
> (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate . . . .

In 1984, the opening clause of § 1123 (a) was amended to read: "Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . ."[7] By its plain language then, § 1123 (a)(5)(D) overrides nonbankruptcy law restrictions on the distribution of

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[6]For example, in *In re Schauer*, 62 B.R. 526 (D. Minn. 1986), aff'd 835 F.2d 1222 (8th Cir. 1987), both the bankruptcy court and the Eighth Circuit undertook this two-step analysis, finding that (1) a Chapter 7 trustee could not transfer the debtor's patronage certificates in a cooperative without the board's permission where the cooperative's by-laws vested the board with sole discretion over the issue, and (2) state law restrictions on the estate's interest were not preempted by various provisions of the Bankruptcy Code cited by the trustee.

This same two-step analysis applies when the estate's property interest is governed by nonbankruptcy federal law. *See, e.g., In re Walker*, 48 B.R. 668 (D.S.D. 1985) (Bankruptcy Code does not override provisions of Farm Credit Act which grants a production credit association sole authority to redeem stock held by a member).

[7]We do not understand the amendment to have effected a substantive change in the prior law. *See* 124 Cong. Rec. 34,005 (1978) (Senate debate on compromise bill submitted for final House approval) (explaining that under § 1123 (a)(5), "[i]f the plan is confirmed, then any action proposed in the plan may be taken notwithstanding any otherwise applicable nonbankruptcy law . . . .").

collateral to satisfy a claim secured by the same. Accordingly, § 1123 (a)(5)(D) supersedes the discretionary power over surrender of the patronage certificates bestowed on Universal's board by its by-laws.

For its part, Universal reminds us of *In re Schauer*, 62 B.R. 526 (D. Minn. 1986), *aff'd*, 835 F.2d 1222 (8th Cir. 1987), which held that state law restrictions on the transfer of patronage certificates similar to those at issue here were not preempted by the Bankruptcy Code. *In re Schauer*, however, is distinguishable on two grounds. First, the trustee there did not rely on § 1123 (a)(5)(D), but argued that § 363 (b)(1)[8] and § 704[9] provided authority for the trustee to sell patronage certificates without the issuing cooperative's approval as required under the cooperative's by-laws. Second, and more importantly, § 363(b)(1) and § 704 are substantively different from § 1123 (a)(5)(D). Neither § 363(b)(1),

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[8]Section 363 (b)(1) provides that: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."

[9]Section 704 provides that:

The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521 (2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

The trustee in *In re Schauer* specifically focused on § 704 (1).

nor § 704, is an empowering statute in the sense that new rights or powers for dealing with the property of the estate are created. Section 704 is simply a directive to the trustee of its duties; § 363 (b)(1) permits the trustee to "use, sell, or lease" property of the estate but evinces no intent to enlarge the trustee's rights to take such actions beyond the debtor's pre-bankruptcy rights. As the Eighth Circuit noted in *In re Schauer*, § 363 (b)(1) and § 704 are no more than "enabling statutes that give the trustee the authority to sell or dispose of property if the debtor[ ] would have had the same right under state law." *In re Schauer*, 835 F.2d at 1225. Stated differently, these sections provide a means within the context of a bankruptcy proceeding for the exercise of a debtor's pre-bankruptcy rights to dispose of its property.

In contrast, § 1123 (a)(5) is an empowering statute. As stated by Collier: "The alternatives set forth in § 1123 (a)(5) are self executing. That is, the plan may propose such actions notwithstanding nonbankruptcy law or agreements." 5 *Collier on Bankruptcy* para. 1123.01, at 1123-10. Section 1123 (a)(5)(D) then does not simply provide a means to exercise the debtor's prebankruptcy rights; it enlarges the scope of those rights, thus enhancing the ability of a trustee or debtor in possession to deal with property of the estate.

Based on this analysis, we believe that the bankruptcy court had the authority to authorize FCX to surrender patronage certificates in satisfaction of Universal's secured claim.[10]

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[10]In fact, Universal apparently concedes the correctness of our analysis of § 1123 (a)(5)(D). In its opening brief, Universal argues that, because the estate had no greater rights to dispose of the patronage certificates than FCX, the bankruptcy court lacked the power to authorize the surrender of patronage certificates in satisfaction of Universal's claim without the approval of Universal's board. Universal's position is different in its reply brief where it acknowledges "that 11 U.S.C. § 1123 (a)(5)(D) authorizes a debtor, within the context of the provisions of a confirmed plan, to satisfy secured claims by surrender of the collateral securing the claim." Reply Brief for Universal at 4. While conceding this threshold question, Universal continues to challenge any surrender of less than all of the certificates: "In this case, the collateral consists of *all* the certificates of participation issued to FCX by Universal. Indeed, if FCX were prepared to surrender to Universal all of the collateral securing Universal's claim,

III

Universal next contends that the bankruptcy court did not enforce the formal requirements for plan modification under the Bankruptcy Code and that this error requires reversal. Universal raises a number of points, most notably that FCX did not provide the appropriate notice of, or information related to, its proposed modification and that the bankruptcy court did not properly evaluate the modified plan against the requirements of § 1129.

The relevant facts are as follows: (1) on May 12, 1987, well after plan confirmation, FCX filed a notice proposing to abandon so much of the patronage certificates as necessary to satisfy Universal's claim, (2) Universal filed an objection to the proposal on May 25, 1987, (3) a hearing was held on June 1, 1987, (4) at the hearing the question apparently arose as to whether the issue was more properly handled under § 1123 and § 1129, (5) the court sent the parties a June 5, 1987 letter including a copy of *In re Massenqill*, 73 B.R. 1008 (E.D.N.C. 1987), and proposing to decide the issue "whether FCX, through plan modification, may surrender a portion of the Universal patronage certificates to Universal in satisfaction of Universal's secured claim," (6) the parties communicated their agreement that the court should address this issue to the court on June 9, 1987, and (7) on June 23, 1987, the court ruled that FCX could so modify its plan and that the certificates were to be valued at face value.

The requirements for post-confirmation plan modification are found in 11 U.S.C. § 1127 (b). That section also incorporates the

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Universal's claim could be satisfied." Reply Brief for Universal at 4 (emphasis in original).

Section 1123 (a)(5)(D), however, authorizes the surrender to a secured creditor of "all or any part" of the collateral securing its claim. Because a creditor is only entitled to realize the value of its secured claim, any surrender of collateral must be accompanied by a valuation of the collateral. If the valuation shows a creditor to be undersecured, it may have an unsecured claim against the estate for the shortfall remaining after surrender. If the creditor is oversecured, it can only receive part of the collateral in satisfaction of its claim. The key question here then is not whether FCX can surrender patronage certificates in satisfaction of Universal's claim, but exactly what amount of the certificates must be surrendered to satisfy fully that claim. We take up the valuation issue in Part IV.

requirements of 11 U.S.C. §§ 1122, 1123, and 1129.[11] Essentially, the modification requirements provide for (1) notice of a proposed plan modification, (2) notice of the information necessary for a creditor to assess the nature and impact of the modification, (3) a hearing on the propriety of the proposed modification, (4) an opportunity for an impaired creditor to object to the modification, and (5) an assessment by the bankruptcy court that the modified plan meets the requirements of § 1129.

Even assuming that all of the requirements for formal plan modification were not rigidly complied with here, we do not believe this justifies reversal and remand here — for several reasons.

First, FCX's abandonment notice provided Universal with notice of the essential nature of the modification ultimately effected — a surrender of patronage certificates in satisfaction of Universal's claim — as well as FCX's proposal to value the certificates at face value. The bankruptcy court later notified Universal of the exact Bankruptcy Code provisions implicated, the issue it proposed to decide, and the main precedent the court intended to rely on — *In re Massenqill.*

Second, the bankruptcy court held a hearing attended by both FCX and Universal. Though the hearing was ostensibly called to discuss the abandonment issue, Universal's objections to abandonment filed prior to the hearing set out a broad general objection to any disposition of the certificates in conflict with its by-laws. The bankruptcy court's opinion makes clear that the court understood Universal's more general objection as well as its objection to any valuation of the certificates at other than present value. Further, there is no indication in the record that the bankruptcy court restricted either party in arguing its position on either the surrender or valuation issues.

Finally, there is Universal's claim that we must remand for the bankruptcy court to determine whether the modified plan can be "crammed down" under § 1129 (b) over Universal's objection. We

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[11] Section 1127 (c) also provides that: "The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified." Section 1125 governs the disclosure necessary for post-petition solicitation of acceptance or rejection of the plan from those entitled to vote on the plan.

believe the bankruptcy court has already made this determination as its opinion phrases the issue before the court as whether FCX may surrender patronage certificates in satisfaction of Universal's claim "pursuant to 11 U.S.C. §§ 1123 (a)(5)(D) and 1129 (b)." And in its opening brief Universal concedes that the bankruptcy court at least implicitly made this determination.

We perceive the real dispute here to be Universal's claim that the valuation of the certificates at face value does not comply with the requirement of § 1129 (b)(2)(A)(iii) that Universal receive the "indubitable equivalent" of its claim in order for the modified plan to be "crammed down" over its objection. Its submissions to this court on appeal make clear that the valuation question would be the focal point of the further hearing Universal requests.

Again, we see no reason to reverse and remand for further proceedings on this issue. Universal had an opportunity to object to the valuation of the certificates at face value and to state its argument in support of that objection: that Universal's board has discretion to order redemption of the certificates, that it has historically redeemed the certificates over time on a first-issued, first-redeemed basis, and that, therefore, the present value of the certificates is not equal to their face value, with the older certificates being worth more than newer ones since they will be redeemed sooner. We see nothing in either the bankruptcy or district court opinions to lead us to believe that these courts would rule differently on the valuation issue were they to confront it again, even with the benefit of additional evidence.[12] We thus now turn ourselves to that specific issue.[13]

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[12] We question whether, even as a matter of bankruptcy procedure, Universal is entitled to the further hearing it requests.

Section 102 sets out several "rules of construction" for the Bankruptcy Code. For the phrase "after notice and a hearing," § 102 (1) provides:

> In this title—
>
> (1) "after notice and a hearing," or a similar phrase
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
>
> (B) authorizes an act without an actual hearing if such notice is given properly and if—
>
> (i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act . . . .

11 U.S.C. § 102 (1). This rule of construction applies to the notice and hearing requirement for plan modification in § 1127 (b).

Universal had notice of FCX's proposal to satisfy Universal's claim by surrendering patronage certificates. While Universal's objection to the proposed action might be tantamount to a request for a hearing, the bankruptcy court held a hearing on the issue on June 1, 1987. At that hearing, a question arose as to the appropriate method by which FCX could proceed with its proposal. After the hearing, the court notified the parties that it considered plan modification the appropriate procedure. Thereafter, the parties agreed that the court should decide whether FCX could take its proposed action as a plan modification. Universal never requested a further hearing.

While Universal contends that it never consented to the bankruptcy court deciding the substantive issue under § 1123 (a)(5)(D) and § 1129, the record indicates otherwise. The bankruptcy court's letter to the parties read in full as follows:

> Dear Messrs. Grabiel [General Counsel for Universal] and McCullough [Counsel for FCX]:
>
> Enclosed is an opinion I entered today [June 5, 1987] which may have a bearing on the dispute between FCX, Inc. and Universal Cooperatives, Inc.
>
> As I mentioned from the bench I do not believe abandonment is the appropriate remedy and my inclination is to deny that request.
>
> I infer from Mr. Grabiel's letter that Universal would like me to address the substantive issue rather than prolonging that determination.
>
> Accordingly, I will proceed to decide the issue of whether FCX, through plan modification, may surrender a portion of the Universal the patronage certificates [sic] to Universal in satisfaction of Universal's secured claim.
>
> If I have misconstrued Mr. Grabiel's letter, please let me know immediately.
>
> If the parties wish to discuss this further, a telephone conference call can be arranged.
>
> Very truly yours,
>
> s/ A. Thomas Small
> Bankruptcy Judge

The letter clearly indicates the court's intent to decide the substantive issue here. The court also gave the parties an opportunity to respond prior to its decision. Nevertheless, the only response from Universal was its agreement, communicated through FCX, for the court to proceed. As Universal did not request a further hearing even after receiving notice of the court's proposed decision of the modification issue, under § 102 (1)'s rule of construction, the court was not required to hold one.

IV

Universal contends that if it is forced to accept patronage certificates in satisfaction of its claim, it is entitled to value the certificates at present value.

As just noted, Universal argues that the present value format is the only method of valuing the certificates to be surrendered that will allow Universal to realize the "indubitable equivalent" of its claim as required by § 1129 (b)(2)(A)(iii). In support, Universal cites *In re Cosner*, 3 B.R. 445 (D. Ore. 1980), which acknowledged that by-law restrictions on the redemption of patronage equity credits in a cooperative affect their value, and also cites several cases adopting the proposition that the concept of present value is relevant to the "indubitable equivalent" inquiry.

The bankruptcy court here relied on its decision in *In re Massenqill*, 73 B.R. 1008 (E.D.N.C. 1987), in concluding that the certificates should be valued at face value. In that case, Chapter 12

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[13]By our decision, we do not mean to discount the importance of the Bankruptcy Code's formal plan modification requirements. Those requirements provide important safeguards for the interested parties and should be faithfully observed in bankruptcy proceedings. In this case, however, a number of circumstances have come together that militate against reversal on technical procedural grounds.

Our decision in *Goodman v. Phillip R. Curtis Enterprises, Inc.*, 809 F.2d 228 (4th Cir. 1987), is not to the contrary. Though in *Goodman* we reversed various orders of the bankruptcy and district courts for failure to comply with the proper procedures for plan modification, we implied that some procedural irregularities might not be so egregious as to warrant setting aside a modification order. *Goodman*, 809 F.2d at 233 (The "procedural irregularities here were so egregious that the challenged orders must be held invalid."). More importantly, it was not at all clear in *Goodman* that further proceedings in accordance with required procedural formalities would produce the same result. This was because the bankruptcy and district courts in *Goodman* essentially had *sua sponte* ordered plan modification, though § 1127 (b) allows only the proponent of a plan or a reorganized debtor to initiate post-confirmation modification. Under the circumstances of the case, it was not at all clear that a proper party would seek modification on remand.

Finally, we also intimated in *Goodman* that where responsibility for procedural irregularities rests with any of the adversary parties, a resulting modification order might not be found invalid. *Goodman*, 809 F.2d at 234. Universal agreed to the bankruptcy court's decision of the substantive bankruptcy issue here and should not now be able to avoid the impact of that court's decision by raising procedural irregularities resulting from that request.

debtors sought to release stock in the Federal Land Bank of Columbia (FLB) and the South Atlantic Production Credit Association (PCA) in satisfaction of secured claims held by those entities. The FLB and PCA provided credit to farmers, who were required to be stockholders under the Farm Credit Act. After concluding that the Bankruptcy Code preempted restrictions on stock redemption imposed by the Farm Credit Act, the court turned to the valuation issue. The FLB and PCA argued that the stock should be valued at present value because the stock was historically redeemed only after a stockholder had repaid its indebtedness. The court flatly rejected this argument:

> [B]oth the [Federal] Land Bank and PCA have the right in their discretion to immediately redeem the stock. But, whether or not the stock is in fact redeemed is not important for purposes of determining the amount by which the secured claim of the Land Bank and PCA should be reduced. What is important is that Land Bank and PCA have the right in their discretion to redeem the stock, and if they elect not to exercise that right then they, not the debtors, should bear any economic loss which arises from that decision.

In re Massenqill, 73 B.R. at 1013.

We find the analysis in *In re Massenqill* persuasive. Universal has the discretion under nonbankruptcy law to choose currently to redeem the patronage certificates or to delay redemption to some future date. It necessarily exercises this discretion each day with the effect that a decision to redeem on a given day results in the certificates being valued on that day at face value, while a decision to delay redemption indefinitely results in the certificates having on that day a present value uncertainly discounted below face value. Section 1123 (a)(5)(D) provides authority for the bankruptcy court to order current redemption of, or setoff against, collateral to satisfy a secured creditor's claim, even absent the authorization of that creditor necessary under nonbankruptcy law. Where a creditor seeks to force an uncertainly discounted present value upon collateral — in this case the patronage certificates — simply by deferring setoff from day to day rather than effecting it immediately by redemption as it might, we believe that § 1123

(a)(5)(D) authorizes the bankruptcy court to forestall that effort and require immediate setoff. Otherwise the creditor would be allowed to benefit at the expense of the bankrupt's estate. Directing immediate setoff, hence valuation at face value, gives the creditor exactly the amount it would receive had it voluntarily chosen to agree to the debtor's request for immediate setoff by redemption. This, we think, meets the "indubitable equivalent" standard of § 1129 (b)(2)(A)(iii).[14]

AFFIRMED.

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[14]We find further support for our ruling in Universal's Articles of Incorporation. Though Universal's Articles give it a first lien on all of a member's patronage certificates, those Articles appear to us to authorize cancellation of, or setoff against, only an equal face valued amount of such certificates in satisfaction of the lien. In essence then, Universal's lien extends to a face valued amount of the certificates equal to a member's indebtedness, which is exactly the amount of the certificates ordered to be surrendered here. It would be anomalous if Universal were allowed to value the certificates differently depending on whether it ordered a setoff or cancellation or was ordered effectively to take the same act by a bankruptcy court.

We note that the other requirements of § 1129 must also be met, and decide only whether the valuation of patronage certificates at face value in the circumstances of this case satisfies the "indubitable equivalent" standard of § 1129 (b)(2)(A)(iii). Section 1129 (b)(1) requires a more general finding that the plan is "fair and equitable," of which indubitable equivalence is a specific aspect, to be confirmed. Were, for example, a cooperative to establish that forced redemption of collateral threatened its continuing viability, or the status of its members, we question whether this standard could be met.

No. 88-1525

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

In Re: FCX, INC., Employer's Identification No. 560220040,
Debtor

UNIVERSAL COOPERATIVES, INC.
Creditor — Appellant

v.

FCX, INC.
Debtor — Appellee

THE NATIONAL COUNCIL OF FARMER COOPERATIVES ("NATIONAL COUNCIL")
Amicus Curiae

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

CLERK

No. 87-836-CIV-5

In the
United States District Court
for the
Eastern District of North Carolina

IN THE MATTER OF: FCX, INC.,
Employer's Identification No. 560220040,

Debtor

IN PROCEEDINGS FOR REORGANIZATION
OF A CORPORATION
CHAPTER 11
CASE NO. S-85-01574-5

ORDER

This matter came on for hearing before the undersigned United States District Judge on appeal from an order of the bankruptcy court allowing modification of the debtor's plan. The modification provided for the surrender of certain equity certificates held by the debtor which represent equity allocations made by the creditor Universal Cooperative.

The debtor, Farmer's Cooperative Exchange ("FCX"), is a North Carolina cooperative which purchased goods and incurred debt from Universal Cooperative. Universal is a Minnesota cooperative involved in agricultural sales. As a result of the business conducted between these parties over an extended number of years, FCX became the holder of equity participation in Universal Cooperative. This equity participation allowed Universal to allocate certain profits that it received from business conducted among its member participants. As a result of these allocations of profits, Universal was able to deduct these allocations of equity from its annual

profits and to attribute those to its members. Members would receive cash as a part of the equity allocation and certificates representing the deferred portion of the equity. The payment of cash and deferred equity by way of certificate was income to the recipient and deducted from profit by the cooperative in the year of declaration.

At the time of bankruptcy and under the bankrupt's plan pursuant to Chapter 11, Universal has a debt owed to it by FCX in the amount of $621,471.14. In return, FCX has a claim for equity certificates in the aggregate of $1,116,129.00.

After the bankruptcy court's approval of the plan, FCX petitioned the court to abandon the security held by Universal as a setoff to the claim. FCX proposed to redeem equity certificates at face value up to the amount of Universal's claim.

Rather than allow an abandonment, the court considered and treated the motion as a petition to modify the plan. The parties were informed of the court's intention to treat this request in that fashion and did not object.

The claimant Universal now objects and has appealed regarding the failure to follow the strict requirements of procedure set out in the statute for modifying an existing plan of reorganization. The applicable statute, 11 U.S.C. 1129 (b), requires notice and hearing prior to the approval of any modification of an existing plan.

The notice need only be that which is appropriate under the circumstances. *Id.* The court finds that sufficient notice was afforded under the circumstances to allow the parties to present their positions with respect to this modification. While the procedures were not strictly complied with, there was a substantial compliance and a waiver by the parties of strict compliance in order to adequately comport with the appropriateness standard of the statute.

The Bankruptcy Code authorizes Chapter 11 debtors-in-possession to satisfy secured claims by surrender of collateral securing the claim. 11 U.S.C. § 1123 (a)(5)(D). In *Columbia Bank for Cooperatives v. Lee,* the Fourth Circuit held that this statutory authority to surrender collateral as part of a reorganization plan includes the surrender of equity in a cooperative. 368 F.2d 934 (4th Cir.

1966), *cert. denied,* 386 U.S. 992 (1967). The trustee in that case sought to surrender a borrower-member's stock to a bank for cooperatives in partial satisfaction of the bank's secured claim. The bank resisted the trustee and relied on the Farm Credit Act's provisions which essentially granted the bank's board of directors discretionary authority regarding revolvement of members' equity. The Fourth Circuit concluded that the Bankruptcy Act's provisions prevailed over the legislative grant of discretion to a board of directors. Applying the *Columbia Bank for Cooperatives* decision, the bankruptcy court reached a similar decision in the *In Re Massengill* case, _____ B.R. _____ (Case No. 86-02736-SO5, Banks, E.D.N.C., June 5, 1987). The *Massengill* court also permitted the debtors to surrender their stock in the cooperative despite the resistance of the cooperative's board of directors.

Accordingly, FCX likewise can surrender collateral as part of a Chapter 11 plan. The Bankruptcy Act, a federal law, supersedes the discretionary power bestowed by state law and Universal's by-laws. Surrender is an involuntary event compelled by the bankruptcy court. The fact that the creditor's by-laws do not provide for such an occurrence is no bar to the exercise of such power by the bankruptcy court. If a creditor is permitted to disallow such a setoff, the creditor may dictate the terms of reorganization by requiring payment over a number of years and deferring the setoff at its pleasure into the future. This is contrary to the bankruptcy law and at variance with the authority of the bankruptcy court.

By invoking the authority of the bankruptcy court in making a claim, creditors submit themselves to its jurisdiction, including the remedy of setoff. The bankruptcy court appropriately allowed FCX to surrender its equity certificates as a setoff against Universal's secured claim.

The court is of the opinion that the certificates are to be valued at face value as a matter of law. Universal made the decision in each instance to declare the annual equity dividend. Universal determined the amount of cash and the amount of deferred payment in each instance. Each payment was a present exchange between Universal and the holders of its equity certificates. Universal may not now repudiate the face value of these certificates

when applying them against its claim on the bankrupt. These certificates are entitled to be set off at face value against the claim. The bankruptcy court in *Massengill* held that equity certificates immediately redeemable at face value will be set off at face value. The certificates will be surrendered to Universal at their face value.

For the foregoing reasons, the bankruptcy court's order is affirmed.

SO ORDERED this 22nd day of December, 1987.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

No. 87-836-CIV-5

In the
United States District Court
for the
Eastern District of North Carolina

IN THE MATTER OF: FCX, INC.,
Employer's Identification No. 560220040,

v.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the bankruptcy court's order is affirmed.

THIS JUDGMENT WAS FILED AND ENTERED THIS DATE DECEMBER 23, 1987 AND COPIES MAILED TO THE FOLLOWING:

William H. McCullough
Douglas Q. Wickham
P.O. Box 389
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Gregory B. Crampton
W. Sidney Aldridge
P.O. Box 18237
Raleigh, N.C. 27619

Date

Clerk

(By) Deputy Clerk

No. S-85-01574-5

In the
United States Bankruptcy Court
for the
Eastern District of North Carolina

IN RE: FCX, INC., ID#: 56-0220040,

Debtor

MEMORANDUM OPINION AND ORDER

The issue before the court is whether the chapter 11 debtor, FCX, Inc. ("FCX"), may surrender to Universal Cooperatives, Inc. ("Universal") a portion of FCX's certificates of participation in Universal in satisfaction of Universal's secured claim against FCX. A hearing was held in Raleigh, North Carolina, on June 1, 1987, at which Universal objected to the proposed surrender.

FCX, which filed its petition for reorganization under chapter 11 of the United States Bankruptcy Code on September 17, 1985, had been a major customer of Universal, a Minnesota cooperative association which sells farming supplies to co-ops. Universal filed a proof of a secured claim against the debtor on November 1, 1985. FCX and Universal have stipulated that the balance due on this claim is $621,471.14.

Each year that Universal shows a profit, the profits are returned to its members, partially in cash and partially through the issuance of certificates of participation. (See Universal By-Law VI, Section 2.) As earnings accrue, the Universal Board of Directors is authorized, in its discretion, to redeem certificates issued in prior years. (See By-Law VI, Section 4.) Over the years, a number of certificates had been issued by Universal to FCX. It has been stipulated that the face value of FCX's equity in Universal in the form of its certificates of participation is $1,106,129.00. The parties agree that Universal's claim is secured by these certificates.

(*See* Universal Articles of Incorporation, Article VIII.)

The parties have also stipulated that FCX requested that the Universal Board of Directors redeem or revolve FCX equity in Universal and that the Board decided in its discretion to take no action on the request. A letter dated March 6, 1987, from the attorney representing Universal in this proceeding to the attorney representing FCX stated the following:

> Following your presentation to the Executive Committee, expensive [sic] discussion on the questions you raised was had. The Executive Committee took note of: The fact that the law does not require a special redemption of equity; that the By-Laws do not require a special redemption of equity; and in fact it would seem to disfavor it; that given the current agricultural depression, loss years for Universal are possible; that given that same depression, other members of Universal may find themselves in reorganization or liquidation; that Universal's covenants with its bankers require maintenance of certain minimum levels of working capital, and that large liquidations of equity could impair that position; and that the matter is within the sound discretion of Universal's Board of Directors. The Committee reached a conclusion that it would recommend to the Board of Directors that no action be taken on FCX's request at this time. Accordingly, that recommendation was made to the Board of Directors and in fact, the Board took no action with respect to your request.

Subsequently, on May 12, 1987, FCX filed a notice with this court asking for authorization pursuant to 11 U.S.C. § 554 to abandon so much of its certificates of participation as would, at their face value, satisfy Universal's secured claim. Universal filed a written objection to the proposed abandonment on May 25, 1987. A question was raised at the hearing as to whether abandonment pursuant to § 554 was the appropriate procedural mechanism for the debtor to receive a credit for the value of its equity. The parties have since agreed that the issue to be decided is whether

the property may be surrendered pursuant to 11 U.S.C. §§ 1123 (a)(5)(D) and 1129 (b).

Universal takes the position that it cannot be compelled to accept the surrender of the certificates in satisfaction of its claim because its By-Laws give its Board of Directors complete discretion as to when to redeem certificates of participation. Universal points specifically to By-Law VI, Section 4, which states the following:

> Patronage Equities. Certificates of participation, revolving fund credits and any other form of equity arising out of patronage may be paid or redeemed on an equitable basis in whole or in part at such time, in such manner and in such order as shall be determined by the Board of Directors.

This court addressed a similar issue in *In re Massengill*, _____ B.R. _____ (Case No. 86-02736-S05, Bankr. E.D. N.C., June 5, 1987), in which the chapter 12 debtors proposed to surrender stock they owned in the Federal Land Bank of Columbia and in the South Atlantic Production Credit Association to the Land Bank and the PCA in satisfaction of an equivalent amount of debt secured by the stock. The Land Bank and the PCA objected on the grounds that "the Farm Credit Act vests the right to retire or cancel Land Bank or PCA stock *solely* in the discretion of the Land Bank or PCA and that discretion cannot be displaced by provisions of the Bankruptcy Code." (*Massengill*, slip opinion, p.4). Just as the Universal By-Laws give its Board of Directors discretion to redeem certificates of participation, the Farm Credit Act authorized the farming cooperatives involved in *Massengill* to retire their stock, but it did not required them to do so.

This court held in *Massengill* that the debtors would be permitted to surrender their stock in the cooperatives despite the language of the Farm Credit Act. This court stated:

> It is indeed true that the redemption limitations imposed on the stock of land banks and production credit associations were designed to promote stable membership of these organizations and to enhance their capital structure. It is also

> true that 11 U.S.C. §§ 1222 (b)(8) and 1225 (a)(5)(C) which authorize a return of the stock contravene that policy, but here the bankruptcy law controls. It is not uncommon that the Bankruptcy Code will prevail over a conflicting federal law....
>
> ... A debtor's ability to return land bank or production credit association stock to land banks and production credit associations to satisfy or reduce secured claims should not be frustrated by the Farm Credit Act of 1971.

(Slip opinion, pp. 8-9) (citations omitted).

In reaching this conclusion in *Massengill*, this court referred to 11 U.S.C. § 1222 (b)(8) which states that a chapter 12 plan may "provide for... the distribution of all or any part of the property of the estate among those having an interest in such property." This court noted in a footnote that this language had been taken from 11 U.S.C. § 1123 (a)(5)(D), a statutory provision governing chapter 11. (Slip opinion, p.14, n.11). In a subsequent footnote, this court cited *In re Fursman Ranch*, 38 B.R. 907 (Bankr. W.D. Mo. 1984) (citing 11 U.S.C. § 1129 (b)), for the proposition that the surrender of collateral to the holder of a secured claim for a credit against the claim is permitted in chapter 11. (Slip opinion, p.14, n.12).

Copies of the *Massengill* opinion were mailed to both Universal and FCX on June 5, 1987, the date the opinion was entered. No reason has since been suggested, and none appears to this court, as to why the reasoning of *Massengill* is not applicable to the present case. If the provisions of the Federal Farm Credit Act should not be permitted to override the provisions of the Bankruptcy Code, then neither should the By-Laws of a cooperative organized under state law.[1] Therefore, FCX will be permitted to surrender a portion of its certificates of participation in Universal

[1] In *Massengill*, the debtors were required to pay interest on the claims of the Land Bank and the PCA so that, by being permitted to immediately surrender the Land Bank and PCA stock collateral, the debtors reduced the interest payments on the secured claims and thereby made more funds available to unsecured creditors. In the present case, Universal's proof of claim does not claim that Universal is entitled to any interest on FCX's debt, nor does Universal seek

in satisfaction of Universal's secured claim.[2]

Universal takes the position that, if it is to be required to surrender the certificates, the value of the certificates should be discounted from their face value, because, were it not for the surrender, the face value of the certificates would not be paid off until a number of years later. This court rejected the same argument in *Massengill* in view of the fact that the farming cooperatives had the right to immediately redeem their stock. There is no dispute in the present case that Universal has the right to immediately redeem their certificates and that the certificates will be paid off at their face value when they are redeemed. As in *Massengill,* the certificates in this case will be surrendered for a credit against Universal's claim equal to their face value. Accordingly,

IT IS HEREBY ORDERED that FCX, Inc. is authorized to surrender so much of its certificates of participation issued by Universal Cooperatives, Inc. as will at their face value fully satisfy Universal Cooperatives, Inc.'s secured claim of $621,471.14, but no more.

A. Thomas Small
Bankruptcy Judge

---

payment on its claim from any sources other than the certificates of participation. Since those certificates will be paid at face value whenever they are redeemed, it does not appear that unsecured creditors will be affected by today's ruling. Despite this difference between *Massengill* and the present case, the provisions of the Bankruptcy Code authorizing debtors to surrender their collateral should take precedence over Universal's By-Laws.

[2]Allowing FCX to surrender a portion of its certificates of participation in satisfaction of FCX's debt to Universal is consistent with the following language in the proof of claim filed by Universal which appears to recognize FCX's right to setoff: "No security interest is held for this claim except lien and right of offset against Universal Cooperatives, Inc., equity of debtor, provided by Articles of Incorporation and Bylaws, a copy of which is attached."

It should be noted that FCX is seeking authorization to surrender only so much of its certificates of participation as will satisfy Universal's secured claim; the question of whether Universal can be required to redeem FCX's remaining certificates after the secured claim is satisfied is not before the court today.

No. S-85-01574-5

In the
United States Bankruptcy Court
for the
Eastern District of North Carolina

In re: FCX, INC.

Debtor

SECURED

PROOF OF CLAIM

1. [*If claimant is an individual claiming for himself*] The undersigned, who is the claimant herein resides at**

[*If claimant is a partnership claiming through a member*] The undersigned, who resides at** , is a member of , a partnership, composed of the undersigned and , of** and doing business at** , and is authorized to make this proof of claim on behalf of the partnership.

[*If claimant is a corporation claiming through an authorized officer*] The undersigned, who resides at** 5532 14th Ave. So., Minneapolis, MN 55417, is the Vice President and General Counsel of Universal Cooperatives, Inc., a corporation organized under the laws of Minnesota, and doing business at** 7801 Metro Parkway, Minneapolis, MN 55420, and is authorized to make this proof of claim on behalf of the corporation.

[*If claim is made by agent*] The undersigned, who resides at** is the agent of** , and is authorized to make this proof of claim on behalf of the claimant.

2. The debtor was, at the time of the filing of the petition initiating this case, and still is indebted [*or* liable] to this claimant, in the sum of $658,887.14 (Six Hundred Fifty-Eight Thousand Eight Hundred Eighty-Seven and 14/100 Dollars).

3. The consideration for this debt [*or* ground of liability] is as follows: Open account for products supplied.

[*If filed in a chapter 7 or 13 case*] This claim consists of $_____ in principal amount and $_____ in addition charges [*or* no additional charges]. [*Itemize all charges in addition to principal amount of debt, state basis for inclusion and computation, and set forth any other consideration relevant to the legality of the charge.*]

4. [*If the claim is founded on a writing*] The writing on which this claim is founded (or a duplicate thereof) is attached hereto [*or* cannot be attached for the reason set forth in the statement attached hereto].

5. [If appropriate] This claim is founded on an open account, which became [*or* will become] due on the date of filing, as shown by the itemized statement attached hereto. Unless it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

6. No judgment has been rendered on the claim except None

7. The amount of all payments of this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any setoff or counter-claim except

9. No security interest is held for this claim except lien and right of offset against Universal Cooperatives, Inc., equity of debtor, provided by Articles of Incorporation and ByLaws, a copy of which is attached.

[*If security interest in the property of the debtor is claimed*] The undersigned claims the security interest under the writing referred to in paragraph 4 hereof [*or* under a separate writing (or a duplicate of which) is attached hereto, *or* under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such

security interest is also attached hereto. Perfection is obtained and maintained by register and possession of certificate of equity.

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. [*If priority is claimed, state the amount and basis thereof.*]

Claim No. (office use only)

Total Amount Claimed *$658,887.14*

This Claim Filed As:
- ☐ Priority
- ☒ Secured
- ☐ Unsecured

Full Name of Creditor: Universal Cooperatives, Inc.
Signature: Floyd E. Grabiel, VP & General Counsel
Date: October 23, 1985

Penalty for Presenting Fraudulent Claim. Fine of not more than $5,000 or imprisonment for not more than 5 years or both — Title 18, U.S.C., paragraph 152.

* *Include all names used by debtor within last 6 years.*
** *State mailing address*

NOTICE:

1. If you desire an acknowledgment that your claim has been received, you must submit a duplicate of your claim together with a stamped, self-addressed return envelope. Otherwise, no acknowledgment will be made.

2. File your claim with:

Clerk
U. S. Bankruptcy Court
Post Office Drawer 2807
Wilson, North Carolina 27894-2807

INSTRUCTIONS FOR COMPLETING PROOF OF CLAIM

The heading must indicate the debtor(s) name and number which is provided on the notice of the meeting of creditors. The rest of the form **MUST** be completed in **FULL** as follows:

Paragraph #1: Complete **ONE** of the unnumbered paragraphs. Individuals should complete the first paragraph, partnerships the second and corporations the third. Individuals filing a claim as an agent for another person or entity must complete the fourth unnumbered paragraph.

Paragraph #2: Enter the amount due on your claim (net amount after deducting credits, offsets and payments).

Paragraph #3: Show the nature of the debt, such as "Open Account", Rent for January and February, 1980, @ $250.00 per month". "Deed of Trust", "Promissory Note", etc.

Paragraph #4: Attach a copy of the instrument on which the claim is based such as a copy of the note or security agreement.

Paragraph #5: Attach an itemized statement of the account, if any, and insert in the blank space the account due date or the oldest date due if it is a consolidated statement. A consolidated statement indicating the total of the invoices may be filed in lieu of numberous [sic] invoices.

Paragraph #6: Insert "None" unless suit filed and judgment obtained. If judgment obtained give date and location filed, amount and attach a copy of same.

Paragraph #7: This simply states that the amount due in Paragraph #2 is correct.

Paragraph #8: Do nothing unless there has been an offset. If there has, explain and indicate that it has already been subtracted from the balance due shown in Paragraph #2 above.

Paragraph #9: If not holding security, put "None". If holding security, give brief description of the security interest and attach a copy of the agreement and financing statement, if any, showing the date and place of recordation. List any liens including materialman's lien, mechanic's lien, etc. which are not incorporated as judgments in Paragraph #6.

Paragraph #10: Say nothing unless this is a priority claim. If priority, so indicate and add the word "PRIORITY" to the printed words "Proof of Claim" at the top of the form. If claim is for

wages, show the dates worked, rate of pay and social security number. Rent claims should reflect rent period covered and the monthly rate.

CLAIM MUST BE SIGNED AND DATED to be complete for filing. An incomplete form may be returned for completion or, if filed, subject to objection by the trustee and could result in the disallowance of the claim.

Chapter 11 Case No. S-85-01574-5

In the
United States Bankruptcy Court
for the
Eastern District of North Carolina
Raleigh Division

IN THE MATTER
-OF-
FCX, INC.,
(EMPLOYER'S I.D. #56-0220040),

Debtor

IN PROCEEDINGS FOR THE REORGANIZATION OF A CORPORATION

PLAN OF REORGANIZATION
FCX, INC.
AS AMENDED
JULY 30, 1986

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ARTICLE I
DEFINITIONS

The following terms used in the Plan shall, unless the context otherwise requires, have the meanings specified below:

1.1. **"Administrative Claim"**: A cost or expense of administration in the case, including any actual, necessary expense of preserving or liquidating the estate, any actual, necessary expense of operating the business of the Debtor, any actual, necessary expense of consummating the Plan, and all allowances, costs and fees approved by the Court in accordance with the Code.

1.2. **"Columbia Bank for Cooperatives"**: The Columbia Bank for Cooperatives, Columbia, South Carolina ("CBC"), the Debtor's sole secured lender.

1.3. **"Allowed Claim"**: A claim (a)(i) a proof of which is filed within the time fixed by the Court or, if the claim arose out of the rejection of an executory contract or unexpired lease, within such time as may be fixed by the Court after such rejection, or (ii) that has been, or hereafter is, listed by the Debtor as liquidated in amount and not disputed or contingent, and in either event (b) to which no objection to the allowance thereof has been filed within any applicable period fixed by the Court, or as to which the Order allowing such claim has become final and non-appealable. "Allowed Claim" shall include any administrative claim.

1.4. **"Business Day"**: Any day on which banks are open to carry on their ordinary commercial banking business in the State of North Carolina.

1.5. **"Case"**: The Chapter 11 case, number S-85-01574-5 commenced under the provisions of Chapter 11 of the United States Bankruptcy Code on the 17th day of September, 1985, in the United States Bankruptcy Court for the Eastern District of North Carolina.

1.6. **"Claim"**: Any right to payment, or right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, against the Debtor in existence on or as of the petition date, whether or not such right to payment or right to an equitable remedy is reduced to judgment, liquidated, unliqui-

dated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, secured or unsecured.

1.7. **"Code"**: The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, as amended, 11 U.S.C. Sections 101-151326.

1.8. **Compromised Claim"**: The secured claim of CBC as defined in Article III, Paragraph 3.2.

1.9. **Confirmation Date"**: The date of entry of an Order by the United States Bankruptcy Court confirming the Plan.

1.10. **"Consummation Date"**: The first business day occurring on or after the 11th day after the confirmation date; provided, however, that if a stay of the Order confirming the Plan is in effect on such first business day, then the effective date shall be the first business day thereafter on which (i) no stay of the Order confirming the Plan is in effect and (ii) the Order confirming the Plan has not been vacated.

1.11. **"Court"**: The United States Bankruptcy Court for the Eastern District of North Carolina including the United States Bankruptcy Judge, the Honorable A. Thomas Small, presiding in this case.

1.12. **"Creditor"**: The holder of an allowed claim.

1.13. **"Debtor"**: FCX, Inc., an agricultural cooperative corporation, incorporated under the North Carolina Cooperative Marketing Act, ("FCX"), Debtor in this case, or any successor thereto or any transferee of all or substantially all of its assets.

1.14. **"Debtor-in-Possession Loan Agreement"**: That certain loan agreement between Debtor and CBC providing for periodic post-petition loans and advances, approved by the Bankruptcy Court.

1.15. **"Disclosure Statement"**: That certain disclosure statement approved by the Court in the case and accompanying the Plan.

1.16. **"Investments in Other Cooperatives"**: Assets which are the corpus of the liquidating trust, excepting the Debtor's interest in Gold Kist, the FFR and universal litigation and/or offset claim, and stock and allocated surplus of CBC.

1.17. **"Petition Date"**: September 17, 1985, the date on which a voluntary proceeding under the provisions of Chapter 11 of the Bankruptcy Code was filed in behalf for FCX, Inc., the Debtor herein, in the United States Bankruptcy Court of the Eastern District of North Carolina.

1.18. **"Plan"**: The Plan of Reorganization as set forth herein, or as the same may be modified or amended hereafter.

1.19. **"Tax Claims"**: All liquidated unsecured tax claims of governmental units against the Debtor or its property entitled to priority under Section 507(a)(7) of the Code.

1.20. **"Pension Plan"**: The FCX, Inc. pension plan and the Central Carolina Farmers, Inc. retirement income plan which have been maintained and sponsored by FCX.

1.21. **"Liquidating Trust"**: That certain trust agreement, specimen copy of which is attached hereto, between FCX, Inc. and the trustee designated therein for the benefit of the CBC, unsecured creditors and subordinated debenture holders.

1.22. **"Remaining Non-Operating Assets"**: Assets not sold to Gold Kist or Southern States and which are not the corpus of the liquidating trust.

1.23. **"Stipulation Regarding Debtor's Motion and Order Entered Thereon Concerning Extension of Exclusivity"**: That certain stipulation by and among FCX, CBC, Unsecured Creditors Committee and Subordinated Debenture Holders Committee concerning claims of the respective parties.

1.24. **"Subordinated Claim"**: The portion of the claim of CBC as set forth in Article III, Paragraph 3.2 subordinated to claims, as defined, of unsecured creditors and subordinated debenture holders.

ARTICLE II
CONSTRUCTION

Where not inconsistent, or in conflict with the provisions of the Plan, the words and phrases used herein shall have the meanings ascribed thereto in the Code and in the Bankruptcy Rules.

ARTICLE III
NATURE OF PLAN

3.1 **Summary**: The Plan hereinafter set forth provides for all claims of creditors of the Debtor. The Plan proposes an orderly

liquidation of the Debtor's remaining non-operating assets and assumes an effective date of July 30, 1986.

The Plan contemplates three classes of creditors and one class of interest holders whose interests will be impaired, including the CBC, unsecured creditors, subordinated debenture holders and equity security holders.

3.2 **Columbia Bank for Cooperatives**. In general this Plan provides for an adjustment to the claim of the CBC by compromising the same against the Debtor in the following manner:

(a) CBC shall set off and apply the proceeds of all of the Debtor's interest in CBC (including all "C stock" and "allocated surplus" of the bank owned by the Debtor) at face value to the principal balance of loans and advances outstanding by CBC to Debtor;

(b) CBC shall apply payments accrued after July 1, 1985 and applied by the bank to payments of interest as reductions in the principal balance of Debtor's loan and subordinating such claims for pre-petition and post-petition interest to the claims of unsecured creditors and subordinated debenture holders as more particularly set forth hereafter;

(c) CBC shall subordinate its super-priority claim for post-petition loan advances made pursuant to the Debtor-in-Possession Loan Agreement (as amended from time to time) to the reasonable costs of administration, as may be allowed by the Bankruptcy Court, for counsel and financial advisor for the Debtor and counsel for the unsecured creditors committee and subordinated debenture holders committees. CBC reserves its right to object to allowance of all such claims in its sole and absolute discretion;

(d) CBC shall waive its own super-priority claim for counsel fees, expenses and related costs of administration;

(e) CBC shall further subordinate an additional $1,500,000.00 of its claim to the payment of unsecured creditors and subordinated debenture holders as more particularly set forth hereafter; and

(f) CBC shall fund through loans and advances made pursuant to the Debtor-in-Possession Loan Agreement the settlement of the Debtor's potential liability to Energy Cooperative, Inc. ("ECI") in the amount of $156,000.00 which sum, together with the bank's release of its security interest in the Debtor's participation in the bankruptcy estate of ECI, will represent full satisfaction of the Debtor's liability to ECI, upon approval of the Bankruptcy Court, together with reasonable counsel fees attendant thereto as may be approved.

(g) Valid severance pay claims not to exceed the sum of One Hundred Ninety-Five Thousand and No/100 Dollars ($195,000.00) in the aggregate, will be paid to employees of the Debtor terminated as the result of the sale of assets to Southern States, as a post-petition obligation, as follows:

Length of Service:

— up to 10 years — 1 month
— 10 to 20 years — 2 months
— over 20 years — 3 months

Employees offered a job by Southern States Cooperative, Inc. ("Southern States") and accepting the same, shall not be entitled to severance pay. Southern States will fund one-third (1/3) of the severance pay and the Bank will fund the Debtor's requirements as limited and set forth above and agrees to subordinate that portion of the severance pay claim relating to any payment in excess of one (1) month (to the extent not paid for by Southern States) to the unsecured and subordinated debenture holders.

(h) Through loans and advances made pursuant to the Debtor-in-Possession Loan Agreement, except that such loans and advances will be made at the request

of the Debtor and shall bear interest at the CBC term loan variable interest rate, CBC will fund a policy of insurance to insure payment of certain run-off liabilities under the Debtor's Aetna Life Insurance Company Group Insurance Policy #GP-602196 (the "Policy") and Split Funded Agreement (the "Agreement"). Aetna will pay all of the run-off claims under the Policy and the Agreement and retain an amount to cover its reasonable charges and expenses upon the payment in three (3) equal monthly installments of Ninety-Eight Thousand Seven Hundred Sixty-Four and No/100 Dollars ($98,764.00), the first such installment being due on April 1, 1986. The sum of Sixty-Five Thousand One Hundred Ninety and 66/100 Dollars ($65,190.66), which amount reflects certain previous payments of the Debtor's run-off claims, charges and expenses, shall be credited against the first installment payment. The parties hereto further agree that the amounts paid pursuant to this paragraph shall constitute a portion of CBC's claim to be satisfied pursuant to paragraph 9(a)(i) through (iv) of the Stipulation regarding Debtor's Motion and Order of Court entered thereon concerning Extension of Exclusivity.

The resulting "compromised and subordinated claims of the CBC shall be satisfied as set forth in Article VII below.

3.3 **Unsecured Creditors.** Unsecured creditors of the Debtor will receive a minimum pro-rata distribution, if available, aggregating a total of Five Million and No/100 Dollars ($5,000,000.00). Proceeds required to fund such minimal distribution will be developed from the liquidation of the Debtor's non-operating assets. Two Million Four Hundred Thousand and No/100 Dollars ($2,400,000.00) of the net proceeds, from the sale of the Debtor's real property in Morrisville, North Carolina, will be placed in an interest-bearing escrow account and distributed, together with interest accrued thereon, to the unsecured creditors on account of this minimum distribution which sum, together with interest earned thereon, will be distributed to the unsecured creditors upon consummation of the proposed Plan, provided, however, that priority payments required

under Sections 503 and 507 of the United States Bankruptcy Code to pre-and post-petition claimants have been satisfied in full.

The Plan proposes additional distributions to unsecured creditors, if available, beyond the minimum pro-rata distribution of Five Million and No/100 Dollars ($5,000,000.00). Should proceeds of the liquidation of non-operating assets produce funds in excess of the amount necessary to pay the unsecured creditors the balance of their minimum pro-rata distribution, then, and in that event, all such excess funds shall be divided equally between the unsecured creditors and the CBC until all such excess funds have been exhausted or the subordinated claim of the CBC has been paid in full. In the event the subordinated claim of the CBC is paid in full, any excess funds shall be paid to the unsecured creditors until all excess funds have been exhausted. Further, unsecured creditors may receive a share of distribution of proceeds from the liquidating trust as more particularly set forth hereafter.

3.4. **Subordinated Debenture Holders**. Following satisfaction of the CBC's compromised claim and the minimum pro-rata distribution to unsecured creditors, subordinated debenture holders shall receive the available proceeds of the Debtor's investments in other cooperatives distributed through the liquidating trust, until they receive a total minimum pro-rata distribution of up to Five Million and No/100 Dollars ($5,000,000.00). In the event that the proceeds of the liquidating trust provide a surplus after payment to the subordinated debenture holders of Five Million and No/100 Dollars ($5,000,000.00), then such excess shall be divided between the subordinated debenture holders, the CBC (until the CBC receives payment in full of its "subordinated" claim), and the unsecured creditors (until they receive payment in full of their claims) one-third (1/3), one-third (1/3) and one-third (1/3).

3.5. **Employee Claims**. Upon the effective date of the Plan, the CBC will release its secured interest against the over-funded pension plan acquired by the Debtor effective July 1, 1980, by a merger with Central Carolina Farmers' Exchange, Inc. ("CCF"), providing that the Debtor is successful in merging the plan (CCF Plan) into the existing FCX pension plan. CBC shall release its security interest in said over-funded portion of the CCF pension plan and further waives in favor of employees of FCX its right

to secure any excess over-funding of the FCX plan occasioned by said merger.

Pre-petition priority claims of employees for wages, vacation pay, sick pay and other claims provided priority by Section 507 of the Code are unimpaired under the terms of this Plan. In addition, post-petition claims for such matters are treated as costs of administration claims under the Plan, payment of which is provided on the effective date of the Plan or as soon thereafter as such claims may be determined and allowed. In addition certain claims for severance pay, resulting from the sale to Southern States, shall be paid in accordance with Paragraph 3.2(g) above.

3.6. **Equity Security Holders**. The Plan proposes that the Bankruptcy Court find and determine that all equity interests in the Debtor, junior to subordinated debenture holders are without value and that the holders thereof are entitled to declare such loss.

ARTICLE IV
ADMINISTRATIVE AND TAX CLAIMS

4.1. **Administrative Claims**. Administrative claims are defined as a cost or expense of administration of the case, including actual, necessary expense of preserving or liquidating the estate, any actual, necessary expense of operating the business of the Debtor, any actual, necessary expense of consummating the Plan and all allowances, costs and fees approved by the Court in accordance with the Code. The CBC has agreed to subordinate its super-priority claim for post-petition loan advances made pursuant to the Debtor-in-Possession Loan Agreement, as amended from time to time, to the reasonable costs of administration, as may be allowed by the Bankruptcy Court for counsel and financial advisors for the Debtor and counsel for the unsecured creditors committee and subordinated debenture holders committee. Such subordination is not effective as to other professionals who have been authorized to provide services to the estate. The CBC has, however, reserved its right to object to such allowances in its sole discretion as appropriate. It is estimated that the total amount of cost of administration claims in this case, including expenses

incurred by the Debtor in the ordinary course of business will approximate One Million and No/100 Dollars ($1,000,000.00). The amount of administrative claims will increase as the case continues.

By an amendment to the Stipulation Regarding Debtor's Motion and Order of Court Entered Thereon Concerning Extension of Exclusivity, CBC has agreed to fund, subject to limitations set forth therein, the payment of priority and administrative claims, other than those as previously agreed to be funded by CBC (which includes, among other things, certain professional fees, the Debtor's settlement with ECI and monthly budgeted expenses), as may be finally allowed by the Bankruptcy Court, by making loans and advances to the Debtor-in-Possession Loan Agreement, at CBC's prevailing variable term loan rate. Any such funds advanced to Debtor for that purpose shall be considered to be last dollars received in payment of CBC's compromised claim.

4.2. **Tax Claims**. All liquidated unsecured tax claims of governmental units against the Debtor or its property entitled to priority under Section 507(a)(7) of the Code.

4.3. **Priority Claims**. Claims entitled to priority under Sections 507(a)(3), 507(a)(4), 507(a)(5) or 507(a)(6).

ARTICLE V
CLASSIFICATION OF CLAIMS AND INTERESTS

5.1. **Class One**. The secured claim of the CBC including without limitation, all legal, equitable and contractual rights arising from its security interest in all of the Debtor's assets.

5.2. **Class Two**. All unsecured claims of whatever nature or description against the Debtor, except as otherwise classified in the Plan.

5.3. **Class Three**. Claims off subordinated debenture holders.

5.4. **Class Four**. Claims off holders of common and preferred stock of the Debtor, certificates of equity and members of Debtor.

ARTICLE VI
TREATMENT OF CLAIMS IN CLASSES NOT IMPAIRED UNDER THE PLAN

6.1. **Administrative Claims**. Any administrative claim shall be paid in cash in full on the entry of an Order of the Court allowing such administrative claim or on the consummation date, or as soon thereafter as may be practicable. Any administrative claim representing a liability incurred in the ordinary course of business may be paid in cash in the ordinary course of business.

FCX is primarily liable for certain so-called "runoff" liabilities pursuant to its Aetna Life Insurance Company ("Aetna") Group Insurance Policy #GP-602196 ("the policy") and Split Funded Agreement ("the agreement"). Runoff liabilities are liabilities incurred while the policy was in force that (1) have not yet been recorded as paid or (2) have been extended, such as extended liability claims for disabled individuals. The policy and agreement were terminated as of midnight, March 31, 1986.

FCX will pay its runoff liabilities, as an administrative expense, by insuring these liabilities through an arrangement with Aetna as follows:

(1) FCX will make a cash premium to Aetna to insure the sum of: (a) the estimated runoff claims as of April 1, 1986, and (b) the reasonable expenses associated with processing this runoff (the "runoff liabilities"). The runoff claims are estimated to be Two Hundred Seventy-Three Thousand Nine Hundred Eighty-Eight and No/100 Dollars ($273,988.00) and the related expenses are estimated to be Twenty-Seven Thousand Three Hundred Ten and No/100 Dollars ($27,310.00), for a total runoff liability figure of Three Hundred One Thousand Two Hundred Ninety-Eight and No/100 Dollars ($301,298.00). The premium to insure the runoff liabilities will be paid in a lump sum of Two Hundred Ninety-Four Thousand Thirty-Three and No/100 Dollars ($294,033), or in three (3) equal installments of Ninety-Eight Thousand Seven Hundred Sixty-Four and No/100 Dollars ($98,764.00) each, unless otherwise agreed upon between Aetna and FCX. Aetna shall credit the sum of Sixty-Five Thousand One Hundred Ninety and 66/100 Dollars ($65,190.66) against either the lump sum payment or first

installment payment, reflecting funds that have been paid to Aetna for the payment of FCX's runoff claims and expenses.

(2) In exchange for the premium payment by FCX, Aetna will pay all of the runoff claims and retain an amount to cover Aetna's reasonable expenses. If runoff liabilities exceed FCX's premium payment, Aetna will pay these claims and expenses without reimbursement from FCX.

(3) Aetna will prepare and submit to FCX a final written accounting of runoff liabilities as of October 1, 1987 (18 months after the termination date of March 31, 1986). This accounting will be provided to FCX not more than two (2) months after that date.

All of the premiums paid by FCX, which are not paid out in properly incurred runoff claims and reasonable expenses related thereto by October 1, 1987, shall be refunded to FCX on the date the accounting is submitted. The Aetna accounting will be subject to review by FCX and its agents and to possible challenge before the Bankruptcy Court if a disagreement arises as to any aspect of the claims payments and expenses, repayment, accounting or any matter related thereto. Aetna shall also provide an interim review of the runoff experience as of January 1, 1987, to determine whether a preliminary refund of unused FCX premium can be made at that time if, in Aetna's reasonably exercised discretion, based upon Aetna's past actuarial experience, the experience review so allows. This interim review shall also be subject to the above-described review and possible challenge by FCX.

Any refund that is declared at either the interim review or final accounting shall be paid to FCX without recourse.

Aetna will provide detailed, written information to FCX on a quarterly basis regarding the runoff claims paid and Aetna's reasonable expenses related thereto.

Joint experience rating between two different group insurance policies is the procedure that takes into consideration the experience results under both policies when determining an experience credit or deficit.

Specifically for FCX, joint experience rating between the runoff under the group insurance policy that terminated on March 31, 1986 (the "Old Policy") and the new policy that was effective on

April 1, 1986 (the "New Policy") means that before a possible experience credit is declared based upon the runoff experience of the Old Policy, the experience results under the New Policy would first be taken into consideration. (In consideration of the payment of a specified premium, Aetna has agreed to insure the runoff under the Old Policy. When this explanation refers to the experience under the Old Policy, it means the insured runoff experience under the Old Policy.)

All of the employees insured under the New Policy will be considered as a group in determining the experience credit or deficit under the New Policy, and any return premium payable to FCX under its arrangement with Aetna to insure the runoff under the Old Policy will take into consideration any experience credit or deficit attributable to the New Policy.

Whenever a determination of experience credits or deficits is made under either the Old or New Policy, the **net** credit or deficit taking into consideration the experience under both policies will determine whether funds are available for refund to FCX.

In the event that a net deficit develops under joint experience rating (either because the experience deficit under one policy is greater than the experience credit under the other policy, or because both policies have experience deficits), FCX will not be responsible or liable for any further payments to Aetna.

For example, if a Ten Thousand and No/100 Dollars ($10,000.00) experience credit were indicated based solely on the runoff experience of the Old Policy and a Four Thousand and No/100 Dollars ($4,000.00) experience deficit were indicated for the New Policy, then the net credit for both policies would be Six Thousand and No/100 Dollars ($6,000.00) ($10,000.00 — $4,000.00 — $6,000.00). Similarly, if there was a deficit under the Old Policy of Four Thousand and No/100 Dollars ($4,000.00) but a credit under the New Policy of Ten Thousand and No/100 Dollars ($10,000.00), there would be a net of Six Thousand and No/100 Dollars ($6,000.00). If there are deficits under both policies, FCX would pay nothing other than their previously paid premium; but if there are credits on both, the credit will be paid to FCX accordingly.

Aetna shall conduct an interim and final review of the claims charges and expenses under the New Policy at the time it conducts a review for purposes of evaluating the insured runoff experience as noted above. Aetna shall report to FCX the results of its reviews, and FCX shall have the same right to review and possibly challenge Aetna's evaluations as described in the runoff libaility [sic]section above.

6.2. **Priority and Tax Claims**. Claims entitled to priority under Sections 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) incluuding wages, vacation pay, sick leave, contributions to employee benefit plans and taxes of whatever nature or description, to the extent not disputed by the Debtor shall be paid from proceeds generated from liquidation of non-operating assets until paid in full. Any claims within any of the foregoing classes which are disputed as of the date they would otherwise be paid will be paid within a reasonable time following resolution of such dispute.

ARTICLE VII
TREATMENT OF CLASS ONE CLAIMS
(COLUMBIA BANK FOR COOPERATIVES)

Upon confirmation of the Plan, the claim of the CBC shall be reduced by the aggregate amount of the following credits and subordinations:

(a) Application of all "C stock" and "allocated surplus" of the CBC owned by the Debtor at face value to the principal balance of loan and advances by the CBC to the Debtor;

(b) All payments accrued after July 1, 1985, by the Debtor to the CBC and applied to interest shall be reapplied as reductions in the principal balance of Debtor's loans and such pre- and post-petition interest shall be subordinated to claims of unsecured creditors and subordinated debenture holders to a maximum of Five Million and No/100 Dollars ($5,000,000.00) respectively.

(c) The CBC shall subordinate its lien position and super-priority claim for post-petition loan advances made pursuant to the Debtor-in-Possession Loan Agreement for counsel fees of the Debtor, its financial consultant, as well as counsel for the unsecured creditors and subordinated debenture holders committees. The CBC reserves however, its rights to object and be heard in its sole discretion as it deems appropriate. Such obligation terminates upon payment of the compromised claim of CBC.

(d) The CBC shall waive its right to seek reimbursement for counsel fees, expenses and related costs of administration.

(e) The CBC shall subordinate the sum of One Million Five Hundred Thousand and No/100 Dollars ($1,500,000.00) to be advanced by the bank for payment for pre-petition grain and related claims to the interest of creditors and subordinated debenture holders.

(f) The CBC shall advance the sum of One Hundred Fifty-Six Thousand and No/100 Dollars ($156,000.00) together with reasonable counsel fees attendant thereto to fund a settlement with Energy Cooperative, Inc., which has heretofore been approved by the United States Bankruptcy Court.

The resulting claims of the CBC thus becomes its "compromised claim" and its "subordinated claim" as defined herein.

7.1. **Payment**. The compromised claim of the CBC shall be first satisfied from proceeds generated from previously Court-approved sales to Gold Kist, Inc. of Atlanta, Georiga [sic] ("Gold Kist") and Southern States. Further, the CBC shall apply against its compromised claim proceeds generated from the redemption by Gold Kist of FCX's equity interest in Gold Kist and other assets as may be necessary to satisfy the claim of CBC as compromised.

If the compromised claim of CBC has not been satisfied subsequent to application of proceeds as identified herein, then and in that event, the CBC shall receive the first proceeds of liquida-

tion of other assets until such compromised claim is paid in full. In the event that such compromised claim has not been paid in full after exhaustion of proceeds resulting from liquidation of non-operating assets, the CBC shall receive the first proceeds of the liquidation of investments of other cooperatives pursuant to the terms of the liquidating trust, until its claim, as reduced and compromised, is paid in full.

7.2. **Subordinated Claim**. The subordinated claim of CBC shall be paid after receipt by the unsecured creditors of the sum of Five Million and No/100 Dollars ($5,000,000.00), as hereinafter set forth. After payment in full of CBC's compromised claim, unsecured creditors shall receive the next Five Million and No/100 Dollars ($5,000,000.00) from the liquidation of non-operating assets. The CBC has agreed in connection therewith that upon the sale of the Debtor's real property located in Morrisville, North Carolina, the sum of Two Million Four Hundred Thousand and No/100 Dollars ($2,400,000.00) therefrom will be placed in an interest-bearing escrow account and distributed to the unsecured creditors, together with interest accrued thereon, on account of their minimum distribution upon consummation of the proposed Plan, subject, however, to the provisions of Section 507 of the Code. Notwithstanding its lien position regarding such real property, CBC has agreed that funds attributable to the sale thereof shall be in any event made available to unsecured creditors for application upon the minimum distribution to that class.

In the event that the proceeds of the liquidating trust provide a surplus after payment to the subordinated debenture holders of Five Million and No/100 Dollars ($5,000,000.00), then, and in that event, any such excess shall be divided between the subordinated debenture holders, unsecured creditors and the CBC until the latter receives payment in full of the subordinated amounts of its claims one-third (1/3), one-third (1/3) and one-third (1/3). CBC's lien and security interest shall survive confirmation.

ARTICLE VIII
TREATMENT OF CLASS TWO (UNSECURED CLAIMS)

8.1. **Payment**. Claims of unsecured creditors will be discharged by the payment with respect to each such claim of proceeds attributable to the Debtor's orderly liquidation. Subject only to receipt by the CBC of its compromised claim and payment of priority claims, unsecured creditors shall receive the first proceeds from liquidation of non-operating assets until such class of creditors shall have received a minimum distribution of Five Million and No/100 Dollars ($5,000,000.00). Upon receipt of a minimum distribution of Five Million and No/100 Dollars ($5,000,000.00) from the liquidation of non-operating assets, proceeds in excess of such amount shall be divided equally between the unsecured creditors and the CBC until the CBC has received the total amount of its subordinated claim.

In the event unsecured creditors do not receive a minimum distribution of Five Million and No/100 Dollars ($5,000,000.00) from the liquidation of remaining non-operating assets, then, and in such event, unsecured creditors shall receive proceeds from the liquidating trust in such amount as is necessary to distribute to unsecured creditors such minimum amount.

Unsecured creditors will receive the net proceeds from the sale of the Debtor's real property located in Morrisville, North Carolina up to Two Million Four Hundred Thousand and No/100 Dollars ($2,400,000.00) together with the interest earned thereon upon consummation of the Plan. Such proceeds will be distributed together with such interest to unsecured creditors for application upon the minimum distribution of Five Million and No/100 Dollars ($5,000,000.00) and shall not be subject to the prior lien and super-priority claim of the CBC, but shall be subject to the payment of pre- and post-petition priority claims entitled to such priority under the provisions of Section 507 of the Code.

8.2. **Liquidating Trust**. In addition to the distribution hereinbefore referred to, unsecured creditors shall be entitled to one-third (1/3) of the excess funds available through the liquidating trust as hereinafter defined. Such excess funds shall be distributed to the CBC, unsecured creditors and subordinated debenture holders

one-third (1/3), one-third (1/3) and one-third (1/3) to the extent necessary to satisfy their claims in full.

8.3. **The Claims of C.F. Industries, Inc. ("CF").** Nothing in the Plan or the order confirming the Plan shall impair, modify, discharge or otherwise effect (i) the amount, priority or validity of the claims asserted by CF against the Debtor; (ii) CF's assertion that its claims are secured by a lien on capital stock of CF (the "Shares") owned by the Debtor and upon all dividends and other distributions earned or declared upon the Shares; or (iii) CF's assertion that it is entitled to assert a setoff for the amount of its claims against dividends or other distributions earned or declared upon the Shares including the proceeds of a repurchase or redemption of the Shares. CF has asserted claims against the Debtor for:

> $333,821.12 in trade receivables owed to CF by the Debtor on the date this case was commenced;
>
> Damages on account of the Plan's rejection of the Debtor's Member Product Purchase Agreement with CF;
>
> $285,000.00 of required investment by the Debtor in CF on account of a Subscription Agreement in a cooperative known as FCA.

Upon motion by CF, the Debtor, the Subordinated Debenture Holders Committee or the Unsecured Creditors Committee herein, upon not less than 60 days' notice to each of the other aforementioned parties, the Court shall determine the amount, extent, validity and priority of the foregoing claims of CF and CF's asserted liens and right of setoff.

ARTICLE IX
TREATMENT OF CLASS THREE
(SUBORDINATED DEBENTURE HOLDERS)

9.1. **Payment.** Subordinated debenture holders shall receive proceeds from the liquidation of certain of the Debtor's investments in other cooperatives up to a minimum distribution of Five Mil-

lion and No/100 Dollars ($5,000,000.00), subject only to the prior claims of the CBC to receipt in full of its compromised claim, hereinbefore defined, and to receipt by the class of unsecured creditors of Five Million and No/100 Dollars ($5,000,000.00).

The Debtor shall liquidate its investments in other cooperatives through a liquidating trust, a specimen copy of which is attached hereto and incorporated herein by reference. Distribution shall be made in accordance with the terms thereof and this Plan.

9.2. **Certificates of Participation**. Holders of subordinated debentures shall receive certificates of participation in the liquidating trust. The certificate of participation shall be in the manner and form as is attached to the liquidating trust, and shall entitle the holder thereof to receipt of periodic distributions from the available proceeds of the said liquidating trust.

Within thirty (30) days of the date of confirmation of this Plan, the trustee under the terms of the liquidating trust shall transmit to the holder of each subordinated debenture a certificate of participation reflecting the face amount of the prior subordinated debenture.

9.3. **Surplus Proceeds**. In the event that the proceeds of the liquidating trust provide a surplus after payment to the holders of subordinated debentures of Five Million and No/100 Dollars ($5,000,000.00), then and in that event, any such excess shall be divided between the holders of certificates of participation, unsecured creditors and the CBC. Provided, however, that no class shall be entitled to receive more than the face amount of their claims in full.

ARTICLE X
TREATMENT OF CLASS FOUR
(EQUITY SECURITY HOLDERS; MEMBERS)

As used herein, the term "equity security holders" mean holders of preferred stock, common stock (which is membership stock) and certificates of equity issued by the debtor. The holders of such certificate of equity, preferred stock and common stock shall receive no distribution unless, and until, all claims hereinabove set

forth have been paid in full. The Debtor does not anticipate that proceeds will be generated from the orderly liquidation of its remaining operating and non-operating assets to result in a dividend to equity security holders.

10.1. **Finding of No Value**. This Plan proposes that the United States Bankruptcy Court find as a fact that claims in this class are of no value.

10.2. **Cancellation**. The order of confirmation confirming this Plan shall contain a provision cancelling the certificates of equity, preferred stock, common shares or other evidences of equity in FCX, Inc., as being of no value.

ARTICLE XI
COVENANTS OF THE DEBTOR

From the consummation date, until such time as the claims of Class One, Class Two, Class Three and Class Four creditors are fully discharged, or unless waived in writing, the reorganized Debtor will:

11.1. **Financial Statements**. As soon as available, and in any event, within one hundred twenty (120) days after the end of each fiscal year of the Debtor, deliver to parties requesting the same, a copy of the annual financial statement of the Debtor, including its balance sheets as of the end of such year and related changes in financial position, prepared by the Debtor in conformity with generally accepted accounting principles consistently applied.

11.2. **Interim Report**. Within thirty (30) days after each quarterly accounting period of the Debtor, deliver to such parties as may request the same, a copy of the report of operations of the Debtor for such accounting period, which report is certified by an officer of the Debtor to be true and accurate.

11.3. **Taxes and Liabilities**. Pay all taxes, assessments and other liabilities accruing hereafter, prior to the date on which penalties result therefrom or any lien is imposed on its property as a result thereof, except to the extent that such tax, assessment or other liabilities being contested in good faith and by appropriate proceedings.

11.4. **Post-Confirmation Credit**. Not incur or permit to exist any indebtedness or liability for borrowed money or for the deferred purchase price of any property or services except,

a. Indebtedness for funds borrowed pursuant to the Debtor-in-Possession Loan Agreement heretofore approved by the Bankruptcy Court which is hereby ratified with consent of the CBC to the extent necessary to provide funding during the post-confirmation period prior to payment in full of the adjusted and compromised claim of the CBC;

b. Current or future accounts payable arising in the ordinary course of business;

c. Other indebtedness incurred after the consummation date arising from the ordinary operation of the reorganized Debtor.

11.5. **Liens; Survival of CBC Lien**. Not create or permit to exist any mortgage, pledge, title retention lien, or other lien, encumbrance or security interest with respect to any property, except:

a. Liens arising in the ordinary course of business for sums not due or sums being contested in good faith and by appropriate proceedings and not involving any deposits or advances or borrowed money or the deferred purchase price of property or services;

b. Those existing on the consummation date of this Plan, including the security interest in favor of the CBC which remain in full force and effect and are not affected by the confirmation of this Plan.

11.6. **Guarantees, Loans or Advances**. Not become or be a guarantor or security of, or otherwise become or be responsible in any manner (whether by agreement to purchase any obligations, stock, assets, goods or services, or to apply or advance any funds, assets, goods or services, or otherwise) with respect to any undertaking of any person or entity, or make or permit to exist any loans or advances to any person or entity, except for:

a. The endorsement in the ordinary course of col-

lection, of instruments payable to it or its order; and

b. Advances to officers and employees or suppliers reasonably required in the ordinary course of the Debtor's business.

11.7. **Mergers and Consolidations**. Not be a party to any merger or consolidation except mergers or consolidations approved by the Bankruptcy Court.

11.8. **Investments**. Not purchase or otherwise acquire all or substantially all of the assets of any person or entity except in the ordinary course of business; and not purchase or otherwise acquire any stock of any class of, or any partnership or joint venture interest in, any other person or entity. Provided, however, this shall not restrict the operation of the liquidating trust hereinbefore referred to.

11.9. **Access to Information**. Permit and direct its employees and accountants to respond to the reasonable inquiries of all parties in interest on matters regarding the Debtor's financial condition and progress in the orderly liquidation of its remaining non-operating assets.

11.10 **Economies of Administration**. Use every effort to reduce cost of operations including reduction in personnel and overhead expense related to the Debtor's orderly liquidation of remaining non-operating assets.

ARTICLE XII
POST-CONFIRMATION OPERATIONS OF REORGANIZED DEBTOR

The Debtor will operate for the purposes provided herein for a period sufficient to conclude the liquidation of non-operating assets and implementation of the liquidating trust. Such operations shall be consistent with this Plan and limited to an orderly liquidation of remaining tangible and intangible assets. In addition, management shall assist counsel and professional staff in the administration of this Chapter 11 case including development and presenta-

tion of financial data and material as well as an analysis of objectionable claims and prosecution thereof.

12.1. **Board of Directors**. Management of the reorganized Debtor shall be vested in a reconstituted board of directors composed of individuals selected from representative interests in this Chapter 11 case. Such reconstituted board shall take office on the date of consummation of the Plan of Reorganization and consist of five (5) members. The board may have one (1) member selected by the CBC, two (2) members selected by the committee of unsecured creditors and two (2) members selected by the committee of subordinated debenture holders. This reconstituted board of directors shall be responsible for and charged with the liquidation of the Debtor's remaining tangible and intangible assets but, however, shall be held harmless and indemnified from any claims asserted against them individually in the exercise of such responsibility in good faith. The reconstituted board of directors shall administer the terms of the confirmed Plan in all respects and furnish on a quarterly basis a report as to the status of the liquidation of assets and distribution of proceeds related thereto. In addition, the reconstituted board of directors shall implement a system for the periodic distribution of proceeds to unsecured creditors and shall excute in behalf of the Debtor the liquidating trust implementing the terms thereof. If the CBC, Committee of Unsecured Creditors or Committee of Subordinated Debenture Holders decline to serve in such capacity, the Debtor will propose individuals for service upon such Board representing interests of the case, whose appointment shall be subject to prior approval by the Court.

ARTICLE XIII
LIQUIDATION OF NON-OPERATING ASSETS AND ADMINISTRATION OF LIQUIDATING TRUST

The Debtor, under the direction of the reconstituted board of directors, will promptly liquidate its remaining non-operating assets in an orderly fashion for the benefit of parties in interest. During the post-confirmation period and for an indeterminate time, the

Debtor will liquidate and administer its remaining assets. These assets consist of tangible non-operating personal properties, tracts of real property, miscellaneous inventories and its interests investments in other cooperatives.

A. **SALE OF ASSETS; POLICY**. Subsequent to confirmation, the following procedure will be utilized in connection with the sale of assets:

(a) For assets with a fair market value of less than Five Hundred and No/100 Dollars ($500.00) per item, the Debtor is authorized to dispose of those items of property with no formal notice to interested parties or a hearing before the Bankruptcy Court at a price that is substantially the same as the fair market value as represented to the Bankruptcy Court on a list prepared by the Debtor, conditioned upon authorization by Debtor's management and counsel and upon approval by the Bankruptcy Court.

(b) For assets with a fair market value of between Five Hundred and No/100 Dollars ($500.00) and Five Thousand and No/100 Dollars ($5,000.00), the Debtor is authorized to dispose of such items at a price and under terms with no formal notice to interested parties or a hearing before the Bankruptcy Court, conditioned upon the prior written authorization of Debtor's management, counsel for the Debtor, counsel for CBC, counsel for the unsecured creditors committee counsel for the debenture holders committee, and upon approval by the Bankruptcy Court.

(c) For assets with a value in excess of Five Thousand and No/100 Dollars ($5,000.00), the Debtor will furnish notice pursuant to 11 U.S.C. Section 363 by moving for Court approval for such sale and by providing notice of such proposed sale and hearing thereon as required by the Bankruptcy Code and Bankruptcy Rules.

The Debtor reserves unto itself and its reconstituted board of directors the absolute and sole discretion for methodology used in liquidation, subject, however, to the provisions of this Plan and the retained jurisdiction of the Court to enforce its terms.

B. **ADMINISTRATION OF LIQUIDATING TRUST**. The Debtor's investments in other cooperatives shall be liquidated and the proceeds derived therefrom held in a liquidating trust for the use and benefit of CBC, unsecured creditors and subordinated debenture holders. A specimen copy of the proposed trust agreement is attached hereto and incorporated herein by reference. The trust shall be administered by a corporate trustee designated therein who shall not less frequently than once quarterly report to the reconstituted board of directors as to the status of the trust, collections on investments and distributions to parties in interest.

The trust shall be administered by the designated trustee in accordance with the statutes of the State of North Carolina relating to such investments, and for such services, the designated trustee shall be entitled to receive compensation at the statutory rate, or as otherwise may be agreed upon by the parties limited to such Trust. Within thirty (30) days of the date of confirmation, the trustee shall distribute to holders of subordinated debentures, certificates of participation reflecting the face amount of the prior subordinated debenture. All Trust expenses will be borne by the Trust.

C. **INVESTMENT IN CF**. Subsequent to confirmation the Debtor shall retain title to and possession of all capital stock, investments, and other equities (the "CF Equities") owned by it in CF, and such CF Equities shall not be transferred to any third person without the express written consent of CF. Upon the filing of Articles of Dissolution by the Debtor, notice of the same will be provided to CF. In the event the Debtor has not provided for a transfer to a third person acceptable to CF of the CF Equities upon such dissolution, then CF may move for the transfer of the CF Equities to such other person as CF shall designate and the Court shall approve. Such person shall hold the CF Equities in trust for the benefit of the Trustee beneficiaries of the liquidating trust created pursuant to Article XIII.B. of the Plan, and subject to any rights of CF.

ARTICLE XIV
MEANS FOR EXECUTION OF THE PLAN

14.1. **Payments**. The funds required to implement this Plan will be developed from the orderly liquidation of the Debtor's remaining assets as well as advances made pursuant to the Debtor-in-Possession Loan Agreement. Confirmation of the Plan will not require the immediate need for cash in excess of those amounts required to be paid at the effective date. It is estimated that the funding requirement for distribution of claims required to be paid upon the effective date is approximately One Million and No/100 Dollars ($1,000,000.00). The source of revenues for funding such payments are as hereinabove set forth, subject the liens of CBC provided that its compromised claim has not been paid.

14.2. **Events of Default**. The occurrence of any of the following shall constitute an event of default under the Plan:

(a) Failure to make payments as required pursuant to any provision of this Plan, which failure continues for a period of fifteen (15) days after the due date thereon.

(b) The failure on the part of the reorganized Debtor to perform, or the violation of any of the terms, covenants or provisions of this Plan or any document or estimate delivered in connection herewith, including the liquidating trust and certificates of participation representing interests therein, which failure of performance or which violation remains uncured for a period expiring on the 20th day after (i) the Debtor has knowledge of such failure or violation, or (ii) after receipt by the Debtor of written notice from a party in interest of such failure or violation.

14.3. **Remedies Upon Default**. Upon the occurrence of an event of default which is not excused, postponed, modified or waived, holders of claims and parties in interest may exercise all rights and remedies available under this Plan and the Code, and any committee appointed by the Bankruptcy Court or its designee may also exercise such rights and remedies upon such default.

14.4. **Revesting of Property In The Debtor**. All of the assets of the Debtor will be retained by the Debtor and on the day of entry of an Order confirming the Plan the Debtor will hold all right, title and interest of the property of the Debtor, and the reorganized Debtor will have the right to possession and use of said property consistent with the provisions of this Plan subject to the lien of the CBC if the compromised claim has not then been paid in full.

ARTICLE XV
EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Except as otherwise specified, the filing of this Plan shall constitute a rejection of all executory contracts which exist between the Debtor and any individual or entity, whether such contracts be in writing or oral, which have not heretofore been rejected or assumed by Orders of this Court. Provided, however, that this provision is not intended to reject and does not reject any contracts entered into following the initiation of this case, or any contracts adopted by the terms of this Plan.

ARTICLE XVI
MODIFICATION OF THE PLAN

16.1. **Modification Prior to Confirmation**. Modifications of the Plan may be proposed in writing by the Debtor, at any time before the confirmation date, provided that such Plan, as modified, meets the requirements of Sections 1122 and 1123 of the Code, and the Debtor shall have complied with Section 1125 of the Code.

16.2. **Modification After Confirmation**. The Plan may be modified at any time after the confirmation date and before its substantial consummation, provided that such Plan, as modified, meets the requirements of Sections 1122 and 1123 of the Code and the Court, after notice and a hearing, confirms such Plan, as

modified, under Section 1129 of the Code, and the circumstances warrant such modification.

16.3. **Deemed Acceptance or Rejection of Modifications**. A holder of a claim or interest that has accepted or rejected the Plan shall be deemed to have accepted or rejected, as the case may be, the Plan as modified, unless such holder files a notice to the contrary, within the time period for such notice affixed by the Court.

16.4. **Defects or Omissions**. After confirmation, the Debtor may, with the approval of the Court, remedy any defect or omission or reconcile any inconsistencies in the Plan, Disclosure Statement or the Confirmation Order, in such manner as may be necessary to carry out the purposes and effect of the Plan, Disclosure Statement or Confirmation Order, so long as such remedy does not materially or adversely affect the interests of creditors and other parties in interest.

ARTICLE XVII
PROVISIONS

17.1. **Extension of Payment Dates**. If any payment under the Plan falls due on a Saturday, Sunday or other day which is not a business day, then such due date shall be extended to the next following business day.

17.2. **Notices**. Any notice hereunder to the Debtor shall be in writing and, if by telegram or telex, shall be deemed to have been given when sent and, if mailed, shall be deemed to have been given three (3) days after the date when sent by registered or certified mail, postage prepaid, and addressed as follows:

If to the Debtor:

FCX, Inc.
c/o J. Stewart Hodges
Vice President &
Financial Administrator
Post Office Box 2419
Raleigh, North Carolina 27602

With copies to:	William H. McCullough Sanford, Adams, McCullough and Beard Attorneys at Law Post Office Box 389 Raleigh, North Carolina 27602-0389
To the Committee of Unsecured Creditors:	Lacy H. Reaves, Esq. Poyner and Spruill Attorneys at Law Post Office Box 10096 Raleigh, North Carolina 27605-0096
To the Committee of Subordinated Debenture Holders:	Michael E. Weddington, Esq. Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan Attorneys at Law Post Office Box 12807 Raleigh, North Carolina 27605
To the Columbia Bank for Cooperatives:	Howard T. Glassman, Esq. Blank, Rome, Comisky and McCauley Attorneys at Law 1200 Four Penn Center Plaza Philadelphia, Pennsylvania 19102

Or such other address (if any) as the Debtor may have designated as its address for such purposes, or at any address of such party appearing in the records of the party giving such notice.

17.3. **Transfer of Claims**. Claims may be transferred and will be honored only in accordance with the provisions of Bankruptcy Rule 3001.

17.4. **Captions**. The Section captions used in the Plan are for convenience only and shall not affect the construction of the Plan.

ARTICLE XVIII
RETENTION OF JURISDICTION

The Court shall retain jurisdiction of this case to require the performance of any act that is necessary for the consummation of the Plan including, without limitation, the jurisdiction to hear and determine all claims against the Debtor and to enforce all causes of action which may exist in the Debtor's favor, and to modify the Plan pursuant to provisions of Section 1127 of the Bankruptcy Code. In the event an appeal is perfected from the Order confirming the Plan, the Court shall also retain jurisdiction to enter such Orders regarding the disbursement of funds under the Plan or the consummation thereof as may be necessary to protect the interests of the Debtor, its creditors and subordinated debenture holders, as well as other parties in interest. Specifically, the Court shall retain jurisdiction for the following purposes:

(a) Determination of the allowability of claims upon objection to such claim by the Debtor or any other party in interest.

(b) Determination of a request for fees under Section 507(a)(1) of the Code.

(c) Resolution of any disputes regarding the interpretation of the Plan.

(d) Implementation of the provision of the Plan and entry of any Order in aid of consummation of the Plan, and including, without limitation, appropriate Orders to protect the revested Debtor from creditor action.

(e) Modification of the Plan pursuant to Section 1127 of the Code.

(f) Adjudication of any causes of actions, including avoiding powers brought by the Debtor or any other party in interest.

(g) Entry of a final decree.

(h) As well as all other matters properly before the Court by provision of the Code or Rules, including sales of remaining assets and disputes relating thereto.

ARTICLE XIX
OTHER MATERIALS AND HOLD HARMLESS PROVISIONS

19.1 **Disclosure Statement**. The attention of holders of claims in interest in FCX, Inc., is directed to the Disclosure Statement filed with this case together with the Exhibits attached thereto and to the Exhibit attached to this Plan.

19.2. **Indemnification; Hold Harmless**.

(a) **Reconstituted Board of Directors**. The reconstituted board of directors of FCX, Inc. shall serve in accordance with provisions of this Plan and for such actions taken in connection therewith shall be held harmless and indemnified from any actions asserted against them on account of such service, provided that such actions are made in good faith by the members thereof.

(b) **Committees**. Each creditor of the Debtor and other parties in interest, by and upon the confirmation of the Plan, is hereby deemed to have waived, released and relinquished any and all of its claims and rights, if any, against the committee of unsecured creditors, committee of subordinated debenture holders, and committee of equity security holders (including each voting or non-voting member thereof) arising out of, or related to, their respective determinations and recommendations regarding actions, suits, proceedings or other matters in potential claims, and rights, if any, considered during the course of the administration of this Chapter 11 case.

ARTICLE XX
CONFIRMATION FOR IMPAIRED CLASS NOT ACCEPTING THE PLAN

In respect to any class of creditors impaired but not accepting the Plan by the requisite majority in number and two-thirds (2/3) in amount, the proponent of this Plan requests the Court to find that the Plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interest that is impaired under the Plan and that the Court confirm the Plan without such acceptance by said impaired Class or Classes.

ARTICLE XXI
COMMITTEES

(a) So long as any payments or distributions required to be made to creditors have not been made, the committees heretofore appointed by the Bankruptcy Court shall continue in existence. Members of the committees and their designee shall serve without compensation.

(b) In the event that a vacancy occurs on a committee by reason of death, resignation or retirement, or because a designee of a member of a committee shall no longer be employed by such member, the vacancy thereby created shall be filled within thirty (30) days thereafter by a person designated by the member of the committee to whom the former designee was employed or with whom the former designee was affiliated. In the event such member of the committee fails to designate a successor representative to serve on the committee, the vacancy shall be filled by a majority of the remaining members of the committee from among the representatives of holders of claims therein.

(c) Upon the occurrence of one or the other of the following events, and effective immediately upon such occurrence, a member of a committee shall have been deemed to have resigned from the committee:

(1) If such member shall assign all or any portion of its claim (other than as security for an obligation of, or to an affiliate or such general creditor), or

(2) Releases the Debtor from payment of all or a portion of its claim.

Any vacancy created as a result of the foregoing shall be filled by a designee of a majority of the remaining members of the committee from among the employees or representatives of the remaining holders of interest therein.

(d) The committee shall function as such whether or not any vacancy is filled. No holder of a claim in the class represented thereby shall have more than one (1) representative on the committee at any given time.

(e) A committee shall act by a majority vote of its members

present and voting, either with or without formal meetings.

(f) Any committee shall have the power and right to postpone the time of any payment or distribution provided for under the terms of the Plan, in whole or in part.

(g) A committee shall have the power and right, upon such terms and conditions as the committee may determine, to waive, modify or excuse performance of any of the covenants of the Debtor set forth in the Plan, but such waiver or excuse shall not be deemed to constitute a waiver of any other term or provision of this Plan or waiver of any other term or provision of this Plan or waiver or excuse of the same covenant on a different occasion. Any waiver or excuse, or any consent or approval required under provisions of the Plan, or under any document or instrument delivered in connection with this Plan, shall be in writing and executed by a member or a representative of the committee.

(h) The committee shall have the right, subsequent to the confirmation date to utilize the services of attorneys, accountants, or other agents which, in the exercise of reasonable discretion of the committee, are necessary to perform the duties of that particular committee. The Debtor shall pay the reasonable fees and expenses of such attorneys, accountants or other agents. Any dispute that may arise in connection with services or payment for services to be rendered to the committee by any such attorneys, accountants or other agents shall, if necessary, be resolved by the Bankruptcy Court.

(i) Upon the completion of the payments and distributions to be made in accordance with the terms of the Plan, the duties, power and responsibilities of the committees and their agents shall terminate.

(j) Neither the commitee nor any of its members, any of their designees, the firms by whom they are employed, counsel or accountants to the committees, nor any duly designated agent or representative of the committees (hereinafter collectively referred to as "agents") shall be liable to the Debtor, any creditor, or any other person, firm or corporation, for any error of judgment or for any mistake of law or fact or any act done or cause to be done or omitted to be done, by the committees for any of their

agents. Each member of a committee and the committee's respective agents shall be liable only for acts of willful misconduct by itself or such agents.

Respectfully submitted, this the _____ day of _____, 1986.

FCX, INC.
By: William H. McCullough
By: Alfred P. Carlton, Jr.
Sanford, Adams, McCullough & Beard
Attorneys for Debtor
Post Office Box 389
Raleigh, North Carolina 27602-0389
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J. Larkin Pahl
of SMITH, DEBNAM, HIBBERT & PAHL
Special Counsel for the Debtor
Post Office Drawer 26268
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jlpB1382.001

Excerpt from Section IV of the Disclosure Statement of FCX, Inc., June 6, 1986

B. ANALYSIS OF DEBTOR'S VALUES ASSOCIATED WITH EQUITIES IN OTHER COOPERATIVES.

The books and records of the Debtor reflect the following adjusted balances for interests in other cooperatives:

A.	CF Industries	$ 10,091,110.00
B.	Columbia Bank for Cooperatives	$ 7,642,381.00
C.	Gold Kist, Inc.	$ 178,411.00
D.	Gold Kist Joint Venture	$ 4,096,083.00
E.	Carolina Golden Products	$ 26,577.00
F.	Cooperative Seeds	$ 89,000.00
G.	Southern States Cooperatives	$ 145,422.00
H.	Universal Cooperatives	$ 1,149,171.00
I.	Southern States Insurance	$ 33,549.00
J.	Bonnie Plant Farm	$ 42,391.00
K.	Farmers Forage Research	$ 26,600.00
L.	Pitt and Green Electric	$ 68,258.00
M.	North American Poultry Co-op	$ 72,172.00
N.	Others Less Than $10,000.00	$ 41,799.00
	Total:	$ 23,702,924.00

Of the equity interests referred to above, the Debtor's interest in CBC is to be set-off under the terms of the Plan against principal indebtedness. The Debtor's interest in Gold Kist and the Gold Kist joint venture, when redeemed by Gold Kist, as well as interests in FFR and Universal to the extent necessary, will be applied to Debtor's indebtedness to CBC until CBC's compromised claim is paid, and thereafter any such redemption by Gold Kist will be paid to unsecured creditors until its minimum distribution has been paid. Its interest in Carolina Golden Products has been heretofore liquidated with proceeds applied to the principal indebtedness to CBC.

The remaining equities total Eleven Million Seven Hundred

Fifty-Nine Thousand Four Hundred Seventy-Two and No/100 Dollars ($11,759,472.00) and are the subject of a liquidating trust which has hereinbefore been referred to.

It is difficult to assess the liquidation value of the Debtor's remaining equities as these are entities that do not have a standing policy with respect to redemption of such interest. In particular, the Debtor's largest equity interest is associated with CF Industries in the amount of Ten Million Ninety-One Thousand Seven Hundred Fifty-Five and No/100 Dollars ($10,091,755.00). With respect to CF Industries its member investment plan does not address the issue of member mergers or bankruptcies. The Debtor belives that redemption of a member's equity will continue to be handled on an individual basis and will require approval of the board of directors of CF Industries. The Debtor has corresponded with CF Industries, Inc. regarding redemption, however, no position regarding such request has been taken. Considering the state of agricultural markets in this country, it is speculative to assign a particular value with respect to any investment interest in an agricultural cooperative.

In addition, CF Industries has asserted a claim against the Debtor to recover (1) Three Hundred Thirty-Three [sic] Eight Hundred Twenty-One and 12/100 Dollars ($33,821.12) in trade receivables; (2) unliquidated breach of contract claims under a purchase agreement, which CF Industries belives to be substantial; and (3) Two Hundred Eighty-Five Thousand and No/100 Dollars ($285,000.00) on account of a Subscription Agreement with the Debtor. CF Industries asserts that its claim is secured by the Debtor's investment in CF Industries and that CF Industries has a right of setoff against the proceeds of any redemption of the Debtor's investment in CF Industries to recover its claim. The effect of this assertion may be to substantially reduce the amount of the proceeds which may be ultimately received on account of any redemption by CF Industries of the Debtor's investment in CF Industries. CF Industries also asserts that the Debtor's investment in CF Industries in (sic) also subject to restrictions on transfer which must be satisfied before any transfer of those investments may take effect. The Debtor does not necessarily agree with the above assertions of CF Industries.

Chapter 11 Case No. S-85-01574-5

In the United States Bankruptcy Court
For the Eastern District of North Carolina

IN THE MATTER OF:
FCX, INC., Employer's Identification No. 560220040,
Debtor

In Proceedings for the Reorganization of a Corporation

NOTICE OF INTENT TO ABANDON PROPERTY IN FULL SATISFACTION OF SECURED CLAIM

Now comes the debtor-in-possession, FCX, Inc. ("debtor"), through counsel and pursuant to § 554 (a) of the Bankruptcy Code and Bankruptcy Rule 6007 gives notice of its intention to abandon only so much of its Equity Certificates of Participation in the Univeral Cooperatives, Inc. (herein after "Universal") as is necessary to satisfy the secured claim filed by Universal in this proceeding.

1. On September 17, 1985, FCX filed a petition for reorganization under Capter 11 of the United States Bankruptcy Code.

2. Debtor was a North Carolina Farmer's Cooperative which had been engaged in the business of manufacturing and selling agricultural supplies and equipment and also had been engaged in the purchase and sell of agricultural commodities.

3. FCX had, in turn, been a major customer of Universal, a Minnesota Cooperative Association, which is a major supplier to co-ops of automotive, petroleum, farm, dairy, pesticide, animal

health and other products. Over the course of the years, a substantial portion of FCX's annual patronage dividend from Universal and its predecessors has been retained as investment equity by Universal. This equity is presently being held by Universal in the form of Certificates of Participation in varying amounts and numbers. The total amount of patronage refund equity due FCX presently being held in the possession of Universal exceeds $1,000,000.00.

4. On November 1, 1985, Universal filed its proof of claim #3185 in the FCX bankruptcy. The stated amount of the claim is $658,887.14. The amount represents the account receivable due from FCX to Universal for products supplied prior to the date of bankruptcy. The claim was filed as a secured claim. The collateral held by Universal in its possession includes the Certificates of Participation mentioned above.

5. By action of its Board of Directors on August 26, 1986, Universal credited $37,416.00 to the FCX account receivable by reason of repurchase of old Certificates of Participation. The current amount of the account receivable and thus the proper amount for claim #3185 should now be $621,471.14.

6. Universal is entitled to realize upon its collateral held to secure the properly allowed amount of its secured claim, currently $621,471.14. So much of the Certificates of Participation presently held as collateral by Universal as represents this value is of inconsequential value to the FCX estate.

7. By virtue of § 554 (a) of the Bankruptcy Code, the debtor-in-possession is entitled upon notice and hearing to abandon to creditors such property as is of inconsequential value to the estate.

WHEREFORE, FCX prays an order from the Court authorizing its abandonment of so much of FCX's Certificates of Participation as will at their face value fully satisfy Universal's secured claim #3185 in the amount of $621,471.14, but no more. This

abandonment of property will effect payment in full of secured claim #3185 filed in this proceeding by Universal.

ADAMS, McCULLOUGH & BEARD
By: Douglas Q. Wickham
Of Counsel
Attorneys for Debtor-in-Possession, FCX, Inc.
One Exchange Plaza
Post Office Box 389
Raleigh, NC 27602
(919) 828-0564

Chapter 11 Case No. S-85-01574-5

In the United States Bankruptcy Court
For the Eastern District of North Carolina

IN THE MATTER OF:
FCX, INC., Employer's Identification No. 560220040,
Debtor

OBJECTIONS OF UNIVERSAL COOPERATIVES, INC. TO THE APPLICATION OF FCX, INC., ("FCX") TO ABANDON CERTAIN PROPERTY IN FULL SATISFACTION OF SECURED CLAIM

Universal Cooperatives, Inc., pursuant to 11 U.S.C. 554, and Rule 6007 of the Bankruptcy Rules, objects to the Application of debtor, FCX, dated May 6, 1987, to abandon, "so much of FCX's Certificates of Participation [in Universal Cooperatives, Inc.] as will at their face value fully satisfy Universal's secured claim #3185..., but no more."

As of May 15, 1987 FCX's net equity in Universal, including common stock in the amount of $10,000.00, is $1,116,129. As of the same date, the amount of Universal's secured claim is $571,384.00.

Universal objects to any abandonment, and further objects to the extent that such abandonment would require Universal to:

1. Revolve or indicate on its books a revolvement of equity without action and authorization by its Board of Directors; and/or,

2. Revolve or indicate on its books a revolvement of equity in contravention of its Articles on Incorporations, By-Laws, Statutes of the State of North Carolina, and Statutes of the State of Minnesota, all of which would be violated thereby; and/or,

3. Revolve or allocate Certificate of Participation at face value or any valuation other than a reasonably determined present value; and/or,

4. Revolve or allocate Certificate of Participation to the Claim in any order other than chronological based on the oldest Certificate first; and/or,

5. Set off the Claim against an equity interest not presently payable.

Any abandonment authorized by this honorable Court would force Universal to revolve equity in direct contravention to its Articles of Incorporation and By-Laws, to which FCX is party, inasmuch as Universal's Board of Directors has not authorized any revolvement of equity. Such forced abandonment would be be in violation of N.C. Gen. Stat. 54-136 which provides that Cooperative equity is payable only according to the association's By-Laws or Articles of Incorporation.

WHEREFORE Universal Cooperatives, Inc., prays an order from this honorable Court: denying the application of FCX to abandon Certificates of Participation in Universal Cooperatives, Inc.; and, permitting Universal Cooperatives, Inc., to treat and revolve FCX equity in the normal course of business, in accordance with applicable law and the discretion of its Board of Directors.

this the 20th day of May, 1987.

UNIVERSAL COOPERATIVES, INC.
By: Floyd E. Grabiel
Vice President and General Counsel
Attorney for Universal Cooperatives
P.O. Box 460
Minneapolis, MN 55440
(612) 854-0800

United States Bankruptcy Court
Eastern District of North Carolina

A. Thomas Small
Judge
919-856-4603
FTS-672-4603

Post Office Drawer 2747
Room 220
Century Station
300 Fayetteville Street Mall
Raleigh, North Carolina 27602

June 5, 1987

Floyd E. Grabiel
Vice President and General Counsel
Universal Cooperatives, Inc.
P.O. Box 460
Minneapolis, Minnesota 55440

William H. McCullough
Attorney at Law
Adams, McCullough & Beard
P.O. Box 389
Raleigh, North Carolina 27602-0389

In re: FCX, Inc.
S-85-01574-5

Dear Messrs. Grabiel and McCullough:

Enclosed is an opinion I entered today which may have a bearing on the dispute between FCX, Inc. and Universal Cooperatives, Inc.

As I mentioned from the bench I do not believe abandonment is the appropriate remedy and my inclination is to deny that request.

I infer from Mr. Grabiel's letter that Universal would like me

to address the substantive issue rather than prolonging that determination.

Accordingly, I will proceed to decide the issue of whether FCX, through plan modification, may surrender a portion of the Universal the patronage certificates to Universal in satisfaction of Universal's secured claim.

If I have misconstrued Mr. Grabiel's letter, please let me know immediately.

If the parties wish to discuss this further, a telephone conference call can be arranged.

Very truly yours,
A. Thomas Small
Bankruptcy Judge

ATS:mcc
enclosure

cc: The Honorable Peggy B. Deans (w/o encl.)
U.S. Bankruptcy Clerk
Eastern District of North Carolina
P.O. Drawer 2807
Wilson, N.C. 27894-2807

ADAMS, McCULLOUGH & BEARD
Attorneys at Law
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One Exchange Plaza
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HAND DELIVERED BY MESSENGER

June 9, 1987

The Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Eastern District of North Carolina
Federal Building
300 Fayetteville Street Mall
Raleigh, North Carolina 27611

RE: FCX, Inc.
S-85-01574-5

Dear Judge Small:

This acknowledges receipt of your letter of June 5, 1987, enclosing an Opinion rendered by you in the case entitled *In Re: Durwood Rufus Massengill,* Case No. 86-02736-SO5, involving the confirmation of an amended Chapter 12 plan.

This is to advise that I telephoned Mr. Grabiel on the afternoon of June 8, and he also had received a copy of your letter enclosing such Opinion.

Mr. Grabiel and I agreed over the telephone to request that you decide the issue of whether FCX, through plan modification, may surrender a portion of FCX's patronage certificates of Universal to Universal in satisfaction of Universal's secured claim.

We would respectfully point out that there is no issue presently before the Court as to whether FCX may attempt through judicial means to require redemption by Universal of FCX's remain-

ing equity in Universal. Accordingly, Mr. Grabiel and I request that such issue not be addressed at this time.

I represent that I have read this letter over the telephone to Mr. Grabiel prior to delivery of this letter to you, and he joins in this request.

Sincerely yours,

ADAM, McCULLOUGH & BEARD
William H. McCullough

WHM/rh

cc: Floyd E. Grabiel, Esq.

ARTICLES OF INCORPORATION
and
BY-LAWS

UNIVERSAL COOPERATIVES, INC.
A MINNESOTA COOPERATIVE ASSOCIATION
MINNEAPOLIS, MINNESOTA

ADOPTED OCTOBER 6, 1980
EFFECTIVE NOVEMBER 1, 1980
AMENDED OCTOBER 12, 1982

We, the undersigned natural persons of full age, for the purpose of forming a cooperative association under and pursuant to the provisions of Chapter 308, Minnesota Statutes, and laws amendatory thereof and supplemental thereto, do hereby adopt the following Articles of Incorporation.

ARTICLES OF INCORPORATION OF UNIVERSAL COOPERATIVES, INC. A COOPERATIVE ASSOCIATION

ARTICLE I.
Name

The name of this association is Universal Cooperatives, Inc.

ARTICLE II.
Duration

This association shall have perpetual existence.

ARTICLE III.
Purposes and Powers

Section 1. *Purposes.* This association may engage in any activity within the purposes for which cooperatives may be organized under the Minnesota Cooperative Association Act, Sections 308.05-308.18 of the Minnesota Statutes, amendments thereto or substitutes therefor.

Section 2. *Powers.* For such purposes it shall have all of the powers and authority permitted by the laws under which it is organized, including the power to acquire, hold, use, sell, assign, lease, grant licenses in respect of, mortgage or otherwise dispose of letters patent of the United States or any foreign country, patent rights, licenses and privileges, inventions, improvements and processes, copyrights, trademarks and trade names, relating to or useful in connection with any business of the association.

Section 3. *Cooperative Basis.* This association shall be operated on a cooperative basis for the mutual benefit of member-patrons

and subscription patrons and all net income on business done with member-patrons and subscription patrons shall be distributed annually to member-patrons and subscription patrons of the association upon the basis of the business furnished to the association by such member-patrons and subscription patrons respectively, in the manner provided in the By-Laws; and such patronage refunds shall, at all times, be the property of such member-patrons and subscription patrons and not the property or profit of the association.

Section 4. *Limitation.* This association may transact business with both members and non-members, but the aggregate amount of business done with non-members, must not exceed, in value, the aggregate amount of business transacted by the association for its own members during the same fiscal year.

ARTICLE IV.
Capital Stock

Section 1. *Capital Stock.* The Association shall have capital stock and shall have authority to issue eight thousand (8,000) shares of common stock having a par value of One Hundred Dollars ($100) each. No dividend shall be paid thereon.

Section 2. *Membership.* The holders of not less than 100 shares of common stock shall be the members of the association and there shall be only one class of members.

Section 3. *Voting Rights.* The holders of not less than 100 shares of common stock shall as members exercise the sole and exclusive voting power of the association. Each member-shareholder shall have, at the meetings of the member-shareholders, the number of votes, in no event less than one (1) vote nor more than twenty percent (20%) of the total number of authorized votes, determined as follows:

One vote for each full percentage point (or major fraction thereof over the first full percentage point) that the aggregate dollar volume of business of such member-shareholder transacted with the association for such period as shall be specified in the By-Laws bears to the aggregate dollar volume of business transacted by all of the member-shareholders with the association for such period.

Section 4. *Eligibility.* The common stock of the association shall be the only membership stock. It shall only be issued to or held by consumer, purchasing and/or combination marketing and purchasing cooperatives, operated on a federated and/or centralized cooperative basis; and shall be transferable only with the approval of the Board of Directors.

Common shares shall be subject to redemption upon call of the Board of Directors subject to the terms and conditions hereinafter set forth. The power of the Board of Directors to call for redemption of shares of common stock may be exercised upon determination that the shareholder has ceased to maintain its eligible status to own and hold such shares, as said eligibility is defined in these Articles of Incorporation or in the By-Laws of this association.

ARTICLE V.
Dissolution

In case of liquidation, dissolution or winding up of the affairs of this association, either voluntary or involuntary, and after payment of the debts of the association, the assets will be distributed in the following manner and order of preference:

(a) Payment of an amount not to exceed stated value to holders of certificates of participation, capital equity credits, revolving fund credits, and any other evidence of equity arising out of patronage, whether issued as qualified or nonqualified written notices of allocation;

(b) Payment to common shareholders in an amount not to exceed the par value per share thereof;

(c) Any remaining surplus of assets including reserves, if any, shall be distributed on the basis of patronage contributions in a manner to be determined by the Board of Directors, consistent with the United States Internal Revenue code.

ARTICLE VI.
Principal Office

The Association shall have its principal office in the City of Bloomington, County of Hennepin, State of Minnesota.

ARTICLE VII.
Board of Directors

The government of this association shall be vested in a board of not less than five directors. The number, terms of office, and manner of election shall be as specified in the By-Laws.

The names and addresses of the members of the first Board of Directors of this association are as follows:

(NAMES)

The term of office of the first Board of Directors of this association shall be until the first meeting of the stockholders and until their successors are elected and have accepted.

ARTICLE VIII.
Miscellaneous Provisions

Section 1. *Lien.* This association shall have a first and paramount lien upon all capital stock, certificates of participation, certificates of indebtedness, debentures, bonds, other securities, allocated reserves and written notices of allocation, shown or recorded in the name of any holder thereof for such patron's debts, liabilities and obligations owing to the association, which lien shall extend to all dividends and/or interest thereon. After thirty (30) days written notice to a patron, so indebted to the association, if the indebtedness is not sooner liquidated, the association shall be authorized by this provision to foreclose its lien by sale or cancellation of the shares, certificates of participation, certificates of indebtedness, debentures, bonds, other securities, allocated reserves and written notices of allocation, or so much thereof as shall equal the indebtedness, or to foreclose said lien in any other manner provided by law.

This association shall also have the right, exercisable at the option of the Board of Directors, to set off such indebtedness against the amount of such certificates of interest, patronage capital or other interests standing on its books; provided, however, that nothing contained herein shall give the holders of such certificates, patronage capital or other interest any right to have such set off made.

Section 2. *Amendment.* These Articles of Incorporation may be amended as provided by law.

ARTICLE IX.

Incorporators

The names and addresses of the incorporators of this association are as follows:

(INCORPORATORS)

IN WITNESS WHEREOF, the undersigned incorporators have hereunto set their hands this 6th day of October, 1980.

(INCORPORATORS)

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

On this 6th day of October, 1980, personally appeared before me William A. Hiller, K. Russell Cline, A.J. Oukrop, John A. Adams, and Ross W. Gilfillan, to me known to be the persons named in and who executed the foregoing Articles of Incorporation, and each acknowledged this to be his free act and deed for the uses and purposes therein expressed.

Ralph K. Morris
Notary Public
My Commission Expires:
September 14, 1987

APPROVED AS TO FORM AND EXECUTION
OCTOBER 7, 1980
WARREN SPANNAUS, ATTORNEY GENERAL
BY JOHN MURPHY
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCTOBER 7, 1980
JOAN ANDERSON GROWE
SECRETARY OF STATE

NOTE: The original Articles, adopted October 6, 1980, were amended by the Articles of Merger so that on the effective date

of the merger, to wit November 1, 1980, the original Article IV was amended to the form as set forth above.

BY-LAWS
OF
UNIVERSAL COOPERATIVES, INC.
A COOPERATIVE ASSOCIATION

BY-LAW I.
Meetings of Member-Shareholders

Section 1. *Place.* All meetings of the member-shareholders shall be held at such place or places as the Board of Directors may, by resolution, designate; due notice of which shall be given to all member-shareholders in the manner hereinafter provided.

Section 2. *Date, Time of Annual Meeting.* The annual meeting of member-shareholders shall be held within six (6) months after the close of each fiscal year upon a day and hour certain, fixed by the Board of Directors or Executive Committee, due notice of which hour and day shall be given to the member-shareholders entitled to notice, as hereinafter provided.

Section 3. *Special Meetings.* Special meetings of member-shareholders may be called at any time by the Chairman, Board of Directors, Executive Committee, or upon written demand delivered to the Secretary and signed by the member-shareholders entitled to exercise one-fifth (1/5) of the voting power of the association, which demand shall state the specific business to be transacted at said meeting.

Section 4. *Notice of Meeting.* Written notice of every annual and special meeting of the members shall be prepared and mailed to the last known post office address of each member not less than fifteen (15) days prior to the date of the meeting; or in lieu of such mailed notice, the notice may be given by publishing the same at least two (2) weeks prior to the date of the meeting in a legal newspaper published in the county of the principal place of business of the association. Such notice shall state the time and place of the meeting, and in the case of a special meeting the purposes for which the meeting is called. No business shall be transacted at special meetings other than that referred to in the notice.

Section 5. *Quorum.* Ten percent (10%) of the members present in person or represented by mail vote shall constitute a quorum necessary to the transaction of business at any annual or special meeting of the members; provided, however, that a quorum shall never be more than fifty (50).

Section 6. *Order of Business.* Insofar as practicable, the following order of business shall be observed at meetings of member-shareholders:

(a) Ascertainment of existence of a quorum.
(b) Reading of minutes of previous meeting.
(c) Report of officers.
(d) Report of committees.
(e) Unfinished business.
(f) **New business.**
(g) Election of directors.

Section 7. *Voting Rights.* At all meetings of member-shareholders, each member-shareholder shall have such voting rights as are set forth in Article IV of the Articles of Incorporation. The percentage of aggregate dollar volume of business of member-shareholders, referred to in Article IV of the Articles of Incorporation, shall be calculated by dividing each such member-shareholder's aggregate dollar volume of business with the association for the fiscal year immediately preceding each such meeting by the total aggregate dollar volume of business of the association transacted with common shareholders for such period. The vote or votes shall be case on behalf of each such member by a duly authorized representative, holding a proper power of attorney, duly executed by the proper officers of the member. Each member-shareholder shall be bound by the vote of its said representative.

Section 8. *Miscellaneous.* Voting by proxy and cumulative voting shall not be permitted. If two (2) or more persons hold one (1) membership in partnership, joint tenancy, or otherwise, the vote of such membership shall be cast by any one (1) of such persons. A member absent from any meeting may submit a mail vote on any motion, resolution or amendment to be acted upon at such meeting, provided a mail ballot has been specifically authorized by the Board of Directors. A mail vote must be cast

on a ballot containing the exact text of the proposed motion, resolution or amendment by depositing such ballot in the United States mail, with postage prepaid thereon, addressed to the secretary at the principal office of the association not later than five (5) days prior to the day of the meeting at which the vote is taken.

BY-LAW II.
Board of Directors

Section 1. *Number of Directors, Term of Office and Vacancies.* The management of the association shall be vested in a Board of twenty (20) directors. All directors shall be persons associated with a member-shareholder of this association as an officer, director, employee, or agent, and shall be elected for term of office of one year and until their respective successors are elected.

Section 2. *Election of Directors.* Directors shall be elected at the annual meeting of the member-shareholders, or at a special meeting called for such purposes, as follows:

(a) The representative of each of the twenty member-shareholders who have made the largest aggregate dollar volume of purchases of goods or services from the association during the immediately preceding fiscal year shall each nominate one director and, if requested by the Secretary of the meeting, shall certify to such nomination.

(b) If and to the extent that less than two (2) of the directors nominated under Subsection 2(a) above are representatives of consumer cooperatives, and less than one (1) of the directors nominated under Subsection 2(a) above are representatives of Canadian cooperatives, there shall be nominated under this Subsection 2(b) representatives of consumer cooperatives and representative of Canadian cooperatives — the intent being that at all times there shall be not less than two (2) representatives of consumer cooperatives and not less than one (1) representative of Canadian cooperatives on the twenty member Board of Directors.

(c) To the extent necessary to accommodate the nomination of the consumer cooperative and Canadian cooperative representatives provided for in Section 2(b) above, the respective nominated representatives of the twentieth, nineteenth, and eighteenth largest

members volumewise shall not be nominated, thus allowing the nomination of said consumer cooperative and Canadian cooperative representatives.

(d) The twenty representatives thus nominated shall be the only nominees permitted, and shall thereupon be declared to be elected.

(e) To be eligible to serve as a director of this association, a person must be associated with a member-shareholder of this association as an officer, director, employee or agent; provided, however, that there shall not be elected to the Board of Directors more than one person associated with any one member-shareholder of this association as such an officer, director, employee, or agent. In the event a director's association with the member-shareholder he represents is terminated voluntarily or otherwise, said director shall no longer be eligible to serve as a director and a vacancy shall be deemed to exist.

Section 3. *Vacancies.* Any vacancy occurring in the Board of Directors, other than by expiration of the term, shall be filled for the remainder of the term by the election, by the remaining members of the Board of Directors, of a director nominated by the member-shareholder which has been represented by the director in whose office such vacancy occurs. Written certification of the nomination of the new director shall be made by the member-shareholder to the Secretary of the association.

Section 4. *Regular Meetings of Board.* Regular meetings of the Board of Directors shall be held at such times and at such places as shall be determined by resolution of the Board of Directors.

Section 5. *Special Meetings of Board.* Special meetings of the Board of Directors shall be held upon the call of the Chairman or upon written call signed by at least five (5) directors and filed with the Secretary; provided such call so filed shall contain a statement of the purposes for which the meeting is to be called.

Section 6. *Notice of Board Meeting.* The Secretary or Assistant Secretary shall give written notice, by mail, to each director not less than seven (7) days before the holding of any regular or special meeting. Notice of meetings of directors may be waived by a written waiver of notice signed by all directors and filed with the Secretary before or during a regular or special meeting. In cases of emergency the Executive Committee may authorize a

special meeting to be called upon forty-eight (48) hours' written or telegraphic notice.

Section 7. *Quorum.* A majority of the Board of Directors shall constitute a quorum for the transaction of business.

Section 8. *No Compensation — Reimbursement of Expense.* The directors shall receive no compensation for their service as such directors, but the directors shall be reimbursed for all actual and necessary expenses incurred in attending meetings of the Board and committees and in performing other specific duties for the association.

Section 9. *Indemnification of Directors, Officers and Employees.* This association shall indemnify each person who is or has been a director, officer or employee of this association, and each person who is servicing or who has served, at the request of this association, as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorneys' fees, judgments, fines, and amounts paid in settlement, actually and reasonably incurred by him to the fullest extent to which directors, officers and employees may be indemnified under the provisions of Minnesota laws, 1969, Chapter 983, Section 3, or any amendments thereof or substitutions therefor.

This association may purchase and maintain insurance on behalf of any person who may be indemnified to the extent of his right to indemnify under this section.

Section 10. *Executive Committee.*

(a) The Board of Directors shall elect a five (5) member Executive Committee consisting of the Chairman, the Vice Chairman, the Secretary-Treasurer plus two additional persons elected by the Board of Directors from their own number. A majority of the members of the Executive Committee shall constitute a quorum. Between meetings of the Board of Directors, such committee shall have and exercise all of the authority of the Board of Directors in the management and direction of the association; but the designation of such committee and the delegation to it of authority by the Board of Directors shall not operate to relieve the Board of Directors or any member thereof of any responsibility imposed upon it or him by law. The Board of Directors may at any legal

meeting thereof by resolution limit the authority hereby conferred on the Executive Committee or direct its action in any matter, provided such action is not contrary to law, the Articles of Incorporation, or these By-Laws.

(b) The Executive committee shall meet upon call by the Chairman. Notice of meetings of the Executive Committee shall be mailed to each member thereof by the Secretary at least seven (7) days before the time fixed for the meeting. In cases of emergency the Chairman or the Vice Chairman may authorize a special meeting to be called upon forty-eight (48) hours' written or telegraphic notice.

(c) All action by the Executive Committee shall be reported to the meeting of the Board of Directors next succeeding such action and shall be subject to revision or alteration by the Board of Directors, provided that no rights of third parties which have properly acted in reliance on the action of the Executive Committee shall be affected by any such revision or alteration.

(d) The Executive Committee shall review and recommend the salary of the President to the Board of Directors and shall review and recommend the ranges of salaries of staff personnel to the Board of Directors. The Board of Directors shall set the salary of the President and set the ranges of said staff personnel salaries, with authority in the President to fix the actual salaries.

(e) The Chairman or, in his absence, the Vice Chairman shall preside at all meetings of the Executive Committee.

Section 11. *President and General Manager.* The Board of Directors shall name and employ a President who shall have charge of and manage the actual operations of the association under the supervision of the Board of Directors and of the Executive Committee, as above specified, in the intervals between meetings.

BY-LAW III.
Officers

Section 1. *Election.* The officers of the association shall consist of a Chairman, Vice Chairman, President, Secretary, Treasurer, and such assistant secretaries and assistant treasurers and such

other officers, including an Executive Vice President and such persons identified as Vice Presidents for designated functions or departments as the Board of Directors may, from time to time, elect. The Chairman, the Vice Chairman and the Secretary-Treasurer shall be members of the Board of Directors. The remaining officers may or may not be members of the Board of Directors. All officers shall be elected by the Board of Directors at the meeting of the directors immediately after the annual meeting of the member-shareholders. The officers of Secretary and Treasurer shall be held by the same person. All assistant secretaries, assistant treasurers, and the Executive Vice President, if any, and Vice Presidents for designated functions or departments shall be recommended by the President and thereafter appointed by the Board of Directors. The Executive Vice President and each appointed Vice President for a designated function or department shall have such duties, and only such duties, as shall be, from time to time, designated by the President. In the event that any office is held by an employee who is not a member of the Board of Directors, then such office shall become vacant upon the termination or discharge of said employee by the President.

Section 2. *Chairman.* The Chairman shall preside at all meetings of the Board of Directors. He shall preside at all meetings of the member-shareholders of the association. He may, on behalf of the association, execute all contracts, certificates of indebtedness, notes, deeds, bills of sale, and such other written instruments as may be necessary in the operation of the association's business; provided, however, he shall not execute any contract, certificate of indebtedness, note, deed, lease or other written document other than in the course of daily routine operation, unless other execution shall have first been approved by the Board of Directors. He shall, with the Treasurer or Secretary, sign all certificates of stock issued by the association. He shall perform such other duties as may be prescribed by law or ordered by the Board of Directors.

Section 3. *Vice Chairman.* During the absence or disability of the Chairman, the Vice Chairman shall perform all of the duties of the Chairman. He shall perform such other duties as may be prescribed by the Board of Directors.

Section 4. *President.* The President shall have the same power and authority as the Chairman, on behalf of the association, to execute all contracts, certificates of indebtedness, notes, deeds, bills of sale and such other written instruments as may be necessary in the operation of the association's business; provided, however, he shall not execute any contract, certificate of indebtedness, note, deed, lease or other written document other than in the course of daily routine operation, unless such execution shall have first been approved by the Board of Directors. He may, with the Treasurer or Secretary, sign all certificates of stock issued by the association. The President shall also perform all executive duties imposed upon him by the Board of Directors. He shall have charge of the employment of subordinates, the purchase and sale of supplies and products handled by or through the association, the supervision of all plants, factories, warehouses, offices and other facilities of the association and the performance of all other executive acts on behalf of the association excepting such as are specifically reserved to other officers of the association in these By-Laws. The President shall serve at the pleasure of the Board of Directors and shall at all times be subject to the general direction of the Board of Directors or the Executive Committee.

Section 5. *Secretary.* The Secretary shall be custodian of all the books, records, papers, documents, the corporate seal, and all communications and files of the association, saving such as are entrusted to the custody of the Treasurer. He shall record and keep all minutes of meetings of the member-shareholders, Board of Directors, and the various committees appointed by the directors. He shall issue all notices of meetings provided for in these By-Laws, and perform such routine duties as are incident to the holding of such meetings. He shall perform such other administrative duties as may be required by the Board of Directors.

The Secretary may delegate the performance of any of his duties to an assistant secretary.

Section 6. *Treasurer.* The Treasurer shall have custody and charge of all moneys and choses [sic] in action belonging to the association. He shall deposit funds of the association in such depository or depositories as may be designated by the Board of Directors, and he shall disburse the same in such form and man-

ner as prescribed by the Board of Directors. Before assuming the duties of his office, he shall furnish a surety bond in such amount, and with such sureties as shall be approved by the Board of Directors. The premium and other expense incurred in connection with the procuring of such official bond shall be paid by the association. The Treasurer shall sign, either in person or by some mechanical reproduction device, all checks and drafts for the disbursement of funds of the association. The Board of Directors may designate another officer to countersign checks and drafts. Signatures and countersignatures may be by mechanical reproduction devices. The Treasurer shall, along with the Chairman, sign all certificates of stock, and all certificates of indebtedness issued by the association. He shall perform all other duties as are usually incident to the office of the treasurer of a corporation, and as may be prescribed by the Board of Directors.

The Treasurer may delegate the performances of any of his official duties to an assistant treasurer, provided such assistant treasurer has furnished surety bond in such amount and with such sureties as may be approved by the Board of Directors.

BY-LAW IV.

Membership and Subscription Patron

Section 1. *Eligibility.* Membership and status as a subscription patron shall be limited to consumer, purchasing and/or combination marketing and purchasing cooperatives, operated on a federated and/or centralized cooperative basis. Eligibility to hold membership stock shall be as set forth in Section 4, Article IV of the Articles of this Association.

Section 2. *Subscription Patron.* An eligible potential member holding at least one (1) but less than one hundred (100) shares of common stock who has entered into a Subscription Agreement in form and substance determined and agreed to by the Board of Directors shall be known as a subscription patron. A subscription patron shall have no voting or other rights of membership until such time as it holds one hundred (100) shares of common stock.

BY-LAW V.

Certificates of Indebtedness, Debentures and Bonds

Section 1. *Evidences of Indebtedness.* Certificates of indebtedness, debentures, bonds, long term notes, and other securities may be issued to obtain capital other than such as is procured by issuance of capital stock, in such form, and under such terms and conditions as the Board of Directors may order and prescribe, and the same may be secured or unsecured. The same shall be in registered form. The claims of holders of such certificates of indebtedness shall be prior to common stock and to undistributed net savings of the association.

Section 2. *Creation of Lien.* In the event that any of the securities to be issued as provided in the preceding paragraph are to be secured by mortgage or other lien upon any of the assets of the association, the creation of such lien is authorized by a majority vote of the Board of Directors, it shall not be necessary or required to submit to a vote of the shareholders of the association the authorization of a lien upon the association's property, the authorization of the directors alone, as aforesaid, being sufficient to create a valid, binding and enforceable corporate obligation of the association.

BY-LAW VI.

Cooperative Plan-Distribution of Earnings

Section 1. *Net Proceeds.* This association shall operate on a cooperative basis. Net proceeds shall be determined by reference to taxable income reported by the association for Federal income tax purposes, after State income taxes, and before deductions for patronage dividends and net operating loss deductions; and shall be distributed and paid as provided by law and this By-Law.

Section 2. *Patronage Dividends.*

(a) Net proceeds from member-shareholder and subscription patron business shall be calculated, allocated and distributed as hereinafter provided in an equitable manner as determined by the Board of Directors, according to the several departments or divisions of said business; provided, however, that there shall be no

discrimination between member-patrons of the same department or division.

(b) There shall be set aside in a reserve an amount equal to ten percent (10%) of the annual net margins of the association before income taxes, as determined in accordance with generally accepted accounting principles. As used herein, "net margins" refer to those operating results reflected in the association's certified annual financial statements prepared in accordance with generally accepted accounting principles. The reserve shall be composed of the following:

(1) Net proceeds before Federal and State income taxes derived from sources other than net proceeds from member-shareholder and subscription patron business; and,

(2) Such amount as is necessary after (1) above from net proceeds from member-shareholder and subscription patron business in order to equal ten percent (10%) of the said annual net margins before Federal and State income taxes.

(3) In the event the amount in (1) above exceeds ten percent (10%) of the said annual net margins before Federal and State income taxes, nevertheless, the entire amount shall be set aside in said reserve.

(4) Said reserve shall be credited to an unallocated surplus account, and said account may be used for the payment of Federal and State Income Taxes and for any other lawful purposes as determined by the Board of Directors.

(c) All remaining proceeds for the year shall be distributed to the member-shareholders and subscription patrons annually as patronage dividends.

(d) Such patronage dividends shall be apportioned by each member-shareholder and subscription patron within eight and one-half (8½) months after the close of the fiscal year based upon its proportionate share of business done with member-shareholders and subscription patrons. The patronage dividends thus apportioned may, at the discretion of the Board of Directors as determined from time to time, be paid either in cash, in qualified or non-qualified written notices of allocation, or any combination thereof.

(e) The term "written notices of allocation" means any capital stock, revolving fund certificate, retain certificate, certificate of

indebtedness, letter of advice or other written notice which discloses to the recipient the stated dollar amount allocated to him by the organization and the portion thereof, if any, which constitutes a patronage refund or dividend.

Should the Board of Directors not determine otherwise from time to time, eighty percent (80%) of patronage refunds to each subscription patron who has not yet paid in full the par value of one hundred (100) shares of common stock shall be paid in common stock each year until it shall have accumulated and acquired one hundred (100) shares of common stock; thereafter, distribution of the non-cash portion of patronage dividends shall be in the form and manner set forth in Section 2(d) of this Article.

(f) Each person (cooperative association) who applies for and is accepted to membership in this association and each member of this association on the effective date of this Article who continues as a member after such date shall, by such act alone, consent that the amount of any distributions with respect to his or its patronage which are made in written notices of allocation (as defined in 26 U.S.C. § 1388) and which are received by him or it from the association, will be taken into account by him of it at their stated dollar amounts in the manner provided in 26 U.S.C. § 1385 in the taxable year in which such written notices of allocation are received by him or it — it being the intent of this Article to provide a consent binding on all members who retain or obtain membership in this association after the adoption of this Article and receipt of a written notification and copy of this Article for the purpose of making such distributions "qualified written notices of allocation" within the meaning of 26 U.S.C. § 1388 (c). Each member of this cooperative shall receive a written notification and copy of this Article.

Section 3. *Loss or Losses.* In the event of a loss in one or more departments or divisions of operation of this association, but not of such magnitude as to cause an overall loss for the fiscal year of the association, such loss or losses may be prorated against each of the remaining profitable departments on the basis of their respective percentage of the total net margin during such fiscal year.

In the event this association as a whole shall incur a net loss

in any fiscal year, such net loss shall be charged first against any earned surplus or paid-in surplus which is unallocated, or against any unallocated reserve other than valuation reserves. If such loss exceeds the total of said unallocated earned surplus and unallocated reserves, then the amount of such excess of such loss shall be recovered from prior or subsequent years' net margins or savings. In no event shall the Board of Directors have the authority to make any assessment against members. This section shall not be construed or administered in such a way as to deprive the association of the right to carry back or carry forward net operating losses to past or future years, in accordance with the applicable provisions of the Internal Revenue Code or State Taxing statutes.

Section 4. *Patronage Equities.* Certificates of participation, revolving fund credits and any other form of equity arising out of patronage may be paid or redeemed on an equitable basis in whole or in part at such time, in such manner and in such order as shall be determined by the Board of Directors.

Section 5. *Investment Plan.* The member-shareholders, from time to time, may approve or disapprove, as recommended by the Board of Directors, the adoption of reasonable and equitable plans for the financing of the association. Such plans shall have as their objective the alignment of member investment with member patronage. Such plans may further provide for the periodic adjustment of member equity by the retirement of equity investment and may contain requirements for new investment, in lieu thereof, the application of patronage refunds to additional investment requirements. Any such plan or plans when approved by the member-shareholders, shall be binding upon all members of the association.

BY-LAW VII.

Section 1. *Seal.* The association is authorized to adopt and use an official seal, which shall be circular in form and contain the name of the association and the word "Seal."

Section 2. *Fiscal Year.* The fiscal year of this association shall commence on the first day of August in each year and end on the thirty-first of July, next following.

Section 3. *Annual Audit.* At least once annually the Board of Directors shall secure the services of a competent and disinterested certified public accountant, who shall make a certified audit of the books and accounts of the association and render a report in writing thereon, which report shall be submitted to the shareholders.

BY-LAW VIII.
Trademarks

Section 1. If a member individually uses the trademark CO-OP, it shall use its own corporate name conspicuously in connection therewith. The name "Universal Cooperatives, Inc." in connection with the trademark CO-OP may be used only on those products distributed by this association directly or against a contract negotiated by this association.

Section 2. Control over the nature and quality of all merchandise and/or products manufactured and sold under Universal's trademarks shall be maintained by Universal's management under the direction of the Board of Directors.

Section 3. Universal Cooperatives, Inc. shall reserve unto itself, and shall maintain the exclusive right to, the use of its trademarks "CO-OP," and others, on all merchandise and/or products manufactured, purchased or otherwise provided under any and all collective programs carried on by Universal Cooperatives, Inc.; and its corporate name, "Universal Cooperatives, Inc.," shall be conspicuously displayed on or in connection with all of said merchandise or products to indicate their source or origin.

Section 4. Member associations of Universal Cooperatives, Inc., subject to the control over the nature and quality of the merchandise and/or products, as provided in Section 2 hereof, shall have the non-transferable right to the use of Universal's trademark "CO-OP," and any other collective trademark on any merchandise or products not manufactured, purchased, or otherwise provided under a collective program carried on by Universal. The member association's use of Universal's trademarks, as provided herein, shall be by license from Universal Cooperatives, Inc., and shall require said member association's corporate name to be conspicu-

ously displayed on or in connection with all of said merchandise or products bearing said marks to indicate their specific source or origin in the member association, and to indicate the association's membership in Universal Cooperatives, Inc.

BY-LAW IX.

Amendments

These By-Laws may be amended at any annual or special meeting of the members of the Association by the vote of a majority of the votes cast at such meeting, a quorum being present; provided, however, that notice of such meeting must contain a summary statement of the proposed amendment.